TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 543

JOHN J. CONDON, MAYOR, GUSTAV W. KLEIN, JR., FIRST DEPUTY AND ACTING COMPTROLLER, AND RAYMOND J. WHITNEY, CITY MANAGER, ETC., PETITIONERS,

vs.

WALTER F. DOWNEY, RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, IN LIQUIDATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

Statement Under Rule 13.

This is an appeal by the defendants above named, from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938, in the above entitled case, in favor of the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company, in liquidation, against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, in the sum of

4 *Statement Under Rule 13.*

$14,641.84, together with interest thereon in the sum of $2,255.73 and costs in the sum of $72.85.

This action was commenced on February 7, 1936, by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint, with proof of service, were filed on February 13, 1936. The defendants filed an answer on March 24, 1936, which was amended by stipulation dated November 24, 1937. Walter E. Downey,
5 having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth, on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of Arthur E. Muth.

On January 4 and 5, 1938, this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of
6 law as requested by the plaintiff, were signed by Judge Knight and on the same day, Judge Knight signed a memorandum containing his rulings upon the defendants' requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $72.85 and on August 5, 1938, judgment was entered by the plaintiff against the defendants in the sum of $14,641.84, together with interest thereon in the sum of $2,255.73.

Thereafter defendants made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under

Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly the former procedure has been followed herein except that in addition appeal was taken under the new procedure out of abundant caution.

On October 31, 1938, an appeal was allowed defendants from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Benjamin W. Moore, Esq., and the defendants have appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

Date	Matter
Feb. 7, 1936	Filed praecipe and issued summons.
Feb. 13, 1936	Filed summons and complaint and affidavit of service.
Mar. 24, 1936	Filed stipulation extending time to answer to 3/28/36.
Mar. 24, 1936	Filed answer of defendants.
Nov. 20, 1937	Filed note of issue, motion to substitute party plaintiff, returnable 11/26/37.
Nov. 26, 1937	Filed affidavit and notice of motion to substitute Receiver as plaintiff—no opposition.
Nov. 26, 1937	Motion granted—Mandelbaum, J.
Nov. 26, 1937	Filed order substituting Receiver as party plaintiff—Mandelbaum, J.
Jan. 4, 1938	Before Knight—trial begun, jury waived by stipulation.

10 *Docket Entries.*

Jan. 5, 1938	Before Knight—trial continued—dismiss motion reserved—denied, exception.
June 13, 1938	Filed opinion #11,467. Plaintiff to recover $14,641.81.
July 29, 1938	Filed findings of fact and conclusions of law—Knight, J.
July 29, 1938	Filed defendants' requests for findings of fact and conclusions of law.
July 29, 1938	Filed opinion #11,598 on defendants' requests for findings of fact and conclusions of law—Knight, J.
11	
Aug. 3, 1938	Filed bill of costs taxed at $72.85.
Aug. 5, 1938	Filed stipulation that defendants' answer be deemed amended, etc.
Aug. 5, 1938	Filed judgment #38,411 for plaintiff for $16,970.42.
Sept. 26, 1938	Filed note of issue, motion to determine civil rules 46 and 37, returnable 10/4/38.
Oct. 22, 1938	Filed affidt. and notice of motion to determine Civ. Rules 46 and 73.
12	
Oct. 22, 1938	Filed affidt. in opposition to motion to determine Civ. Rules 46 and 73.
Oct. 22, 1938	Filed order denying motion to determine Civ. Rules 46 and 73.
Oct. 28, 1938	Filed order extending time to file bill of exceptions to 1/7/39—Conger, J.
Oct. 29, 1938	Filed exceptions—Knight, J.
Oct. 31, 1938	Filed petition and order allowing appeal—Bondy, J.
Oct. 31, 1938	Filed Assignment of Errors.
Oct. 31, 1938	Filed cost bond on appeal—Great American Indemnity Co.

Summons. 13

Nov. 1, 1938 Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.

Nov. 3, 1938 Filed Citation—Ret. 30 days.

Nov. 22, 1938 Filed Bill of Exceptions and settlement of same (Knight).

Summons.

UNITED STATES DISTRICT COURT, 14

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants. 15

L 63—Page 189.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 7th day of February, A. D. 1936

17

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney.
Office and Post Office Address:
30 So. Broadway, Yonkers,
State of New York.

18

19

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

20

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

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Plaintiff complaining of the defendants, by his attorney, Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929 the First National Bank and Trust Company of Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendants Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are, respectively, the

22 *Complaint.*

Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, and have since the 1st day of January, 1932 together constituted the Board of Trustees of the Police Pension Fund of said City of Yonkers having the care, control and management of said fund by virtue of the provisions of Local Law No. 1 of said City of Yonkers duly enacted during the year 1931.

Third.—That on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by
23 the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers in the place and stead of said Percival
24 W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers to liquidate said bank, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendants and their

predecessors in office have, by virtue of authority vested in them, maintained a deposit account in said bank under the caption "Police Pension Fund" and on the said 20th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 20th day of March, 1933, amounted to the sum of Twenty-Eight Thousand Seven Hundred Seventeen ($28,717) Dollars.

Fifth.—That a pension fund for the policemen of said City of Yonkers was created and established pursuant to the provisions of Chapter 158 of the Laws of the State of New York for the year 1881.

Sixth.—That from the time of the creation and establishment of the said pension fund to and including the 18th day of April, 1900 the provisions of the law with regard to the sources of said fund were in substance as follows:

1. The widows and orphans' fund in the possession of the board of police commissioners of the city of Yonkers on April 30, 1881.

2. All fines imposed by the board of police upon members of the police force.

3. All rewards, fees, gifts, testimonials and emoluments that may be presented, paid or given to any member of the police force for account of police services, except such as shall be allowed by the board of police to be retained by said member.

4. All lost or stolen money remaining in the hands of the board of police for the space of one year, and for which there shall be no lawful claimant, and moneys arising from the sale of unclaimed property, which the board of police are hereby authorized to sell after said property shall have been without a lawful claimant for the space of one year.

5. A sum of money equal to one day's pay per month, or any fractional part of a day for each member of the police force having lost time, to be paid monthly by the treasurer of the board of police commissioners to the treasurer of the board of trustees of the police pension fund from moneys deducted from the pay of members of said force on account of lost time.

6. Two per centum of the salary of each of the members of said police force, who may, by their consent in writing, to be filed with the board of trustees of the police
29 pension fund, consent to its being taken for the police pension fund.

7. All fees received and paid for the sealing and examining of weights and measures by the police as shall be provided by the laws and ordinances of said city. Also all fees received and paid for the inspection and testing of combustible and dangerous materials by the police, as shall be provided by the laws and ordinances of said city.

Seventh.—That from the 19th day of April, 1900 to and including the 20th day of May, 1908 the provisions of the law with regard to the sources of said fund were in sub-
30 stance as follows:

1. The capital, interest, income, dividends, cash deposits, securities and credits formerly belonging to the police pension fund, as created by chapter one hundred and fifty-eight of the laws of eighteen hundred and eighty-one, and the various acts amendatory thereof existing at the time of the passage of this act, with the additions thereto from time to time.

2. All fines imposed by the board of police upon members of the police force.

3. All rewards, fees, gifts, testimonials and emoluments that may be presented, paid or given to any member of

the police force for account of police service, except such as shall be allowed by the board of police to be retained by said member.

4. All lost or stolen money remaining in the hands of the board of police for the space of one year, and for which there shall be no lawful claimant; and the moneys arising from the sale of unclaimed property which the board of police are hereby authorized to sell after said property shall have been without a lawful claimant for the space of one year.

5. A sum of money equal to one day's pay per month or any fractional part of a day for each member of the police force having lost time, to be paid monthly by the treasurer of the board of police commissions to the treasurer of the trustees of the police pension fund from moneys deducted from the pay of members of said police force on account of lost time.

6. All fees received and paid for the sealing and examining of weights and measures by the police, as shall be provided by the laws and ordinances of said city; also all fees received and paid for the inspection and testing of combustible and dangerous materials by the police, as shall be provided by the laws and ordinances of said city.

7. A sum of money equal to but not greater than two per centum of the monthly pay, salary or compensation of each member of the police force, which sum shall be deducted monthly by the treasurer of the police board from the pay, salary or compensation of each and every member of the police force.

8. A sum of money annually equal to but not greater than ten per centum of all excise moneys, after deducting rebates or returns, received by the city of Yonkers from or on account of the granting of licenses or permission to

34 *Complaint.*

sell strong or spirituous liquors, ale, wine or beer, and of any moneys paid for taxes upon the business of trafficking in or selling or delivering any strong or spirituous liquors, ale, wine or beer.

Eighth.—That from the 21st day of May, 1908 to and including the 22nd day of November, 1931 the provisions of the law with regard to the sources of the said fund were in substance as follows:

1. All fines imposed by the Commissioner of Public
35 Safety on the members of the Police Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Police Department, for account of police service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the member receiving the same.

3. All moneys, pay, compensation or salary, or any part thereof deducted or withheld from any member or members of the Police Department, for or on account of absence or suspension from duty, except in cases of sickness.
36

4. All lost or stolen money remaining in the hands of the Police Force for the period of one year, and for which there shall be no lawful claimant: and the moneys arising from the sale of unclaimed property, which property the Commissioner of Public Safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustible and dangerous materials, as shall be provided by the laws and ordinances of the city.

6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department, and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary or compensation of each and every member of said Police Department.

7. Ten per centum annually of the excise moneys to which the City of Yonkers may be entitled, by virtue of the provisions of the liquor tax law of the State of New York, which percentage of such moneys must be annually deducted therefrom and paid forthwith to the trustees of the police pension fund.

Ninth.—That from the 23rd day of November, 1931 to and including the 20th day of March, 1933 the provisions of the law with regard to the sources of the said fund were in substance as follows:

1. All fines imposed by the commissioner of public safety on the members of the police department in the city of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the police department for account of police service, except such payments or gifts as have been or shall be allowed by the commissioner of public safety to be retained by the members receiving the same.

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the police department, for or on account of absence or suspension from duty except in cases of sickness.

40 *Complaint.*

4. All lost or stolen money remaining in the hands of the police for the period of one year and for which there shall be no lawful claimant; and the moneys arising from the sale of unclaimed property, which property the commissioner of public safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustibles and dangerous material, as shall be provided by the laws and ordinances of the
41 city.

6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the comptroller of the city of Yonkers from the pay, salary or compensation of each and every member of said police department.

7. An amount payable to the trustees of the police pension fund out of the city treasury at the end of each fiscal
42 year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary or compensation of each member of said police department during such year.

Tenth.—That at all the times herein mentioned the purpose and nature of said fund, as provided by law, was to provide for the payment of pensions to duly retired members of the police department of the City of Yonkers, their widows, children, or next of kin, and in addition thereto, since said 23rd day of November, 1931, to provide for the payment of premiums on group life insurance policies covering the lives of members of said police department.

Eleventh.—Upon information and belief that the money maintained as aforesaid on deposit with said bank was not public money of the State of New York or of any of its political subdivisions. 43

Twelfth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendants and their predecessors, said First National Bank and Trust Company of Yonkers pledged with and to the said City of Yonkers, as security for the repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtednesses evidenced by certain other deposit accounts, certain of the assets of said bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidence by the deposit account maintained as aforesaid by the defendants and their predecessors was unlawful, illegal, null and void. 44

Thirteenth.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 the said Conservator and the said successor Conservator recovered from the said City of Yonkers all of the aforesaid assets so pledged with the said City by payments on account of all the aforesaid deposit accounts and on the 26th day of October, 1933 the deposit account maintained as aforesaid by the defendants stood paid out in full. 45

Fourteenth.—That under date of December 16, 1933 there was made available to all creditors of the said bank a first dividend of 40% of the amount of their deposits at the time of the bank's suspension.

46 *Complaint.*

Fifteenth.—That the said payments referred to in paragraph marked "Thirteenth" of this complaint on account of the deposit account maintained by the defendants as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said bank and were illegal, null and void.

Sixteenth.—That there is now justly due and owing from the defendants to the plaintiff the sum of Seventeen Thousand Two Hundred Thirty and 20/100 ($17,230,20) Dollars representing the difference between the said 40% 47 dividend and the said payments of Twenty-Eight Thousand Seven Hundred Seventeen ($28,717) Dollars.

Seventeenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Seventeen Thousand Two Hundred Thirty and 20/100 ($17,230.20) Dollars, with interest thereon from the 26th day of October, 1933, besides the costs and disbursements of this action.

48 BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address,
30 South Broadway,
Yonkers, New York.

Schedule A, Attached to Complaint.

Description of Assets Pledged	Face Value
Fourth 4¼ Liberty Loan Bonds	$ 40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼%	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00

52 *Schedule A, Attached to Complaint.*

State of Oregon, 5½s, due 1945	$ 2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
53 Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
54 Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$692,000.00

(Duly verified by Arthur E. Muth on February 7, 1936.)

Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 53-189.

The defendants above named by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for their answer to the plaintiff's complaint, respectfully show and allege:

First.—Deny each and every allegation of said complaint contained in paragraphs marked "Eleventh", "Fifteenth", "Sixteenth", and "Seventeenth".

Second.—Deny any knowledge or information sufficient to form a belief as to allegations contained in paragraph marked "Fourteenth".

58 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Third.—Deny each and every allegation contained in paragraph marked "Fourth", except that on the 20th day of March, 1933 there was a credit balance of a certain deposit account, together with accrued interest in said bank amounting to the sum of Twenty-eight thousand seven hundred seventeen ($28,717.00) Dollars.

Fourth.—Deny each and every allegation of said complaint contained in paragraph marked "Seventh"; subdivisions 7 and 8. Admits that the sources of said funds
59 were set forth in Chapter 531 of the Laws of 1900 for New York State.

Fourth-A.—Denies each and every allegation in the paragraph of the complaint numbered "Thirteenth".

Fifth.—Deny each and every allegation contained in paragraph marked "Eighth", subdivisions 6 and 7, and admits that the sources of the fund from 1908 to 1931 were derived from Chapter 452 of the Laws of 1908 for New York State.

60 *Sixth.*—Deny each and every allegation of said complaint in paragraph marked "Ninth", subdivisions 6 and 7, and admits that sources of said fund from November 1931 to March 1933 were derived from Local Law number 1 of the laws of 1931, copy of which is hereto attached and marked "Defendants' Exhibit A".

Seventh.—Deny each and every allegtaion of said complaint contained in paragraph marked "Twelfth", except that the plaintiff, his predecessors, conservators, and the First National Bank and Trust Company, pledged certain securities with the City of Yonkers for said Police Pension

Answer as Amended by Stipulation, Dated November 24, 1937.

Fund account and other indebtedness of the City of Yonkers.

Eighth.—That upon information and belief that the exhibit "A" attached to the complaint is not a correct list of securities pledged with the City of Yonkers on or about the 4th day of March 1933, in that the following bonds were not in the possession of said City:

Fourth 4½ Liberty Loan Bonds	$40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4½%	15,000.00

As a First, Separate and Complete Defense Thereto, the Defendants Further Allege:

Ninth.—That the City of Yonkers is a municipal corporation organized under the laws of the State of New York, pursuant to Chapter 452 of the Laws of 1908.

Tenth.—That the City of Yonkers is a City of the Second Class, pursuant to Chapter 55 of the Laws of 1909 of New York State.

Eleventh.—That local law No. 1—1931 of the Local Laws for Cities in New York State superseded and amended previous laws in relation to the Police Pension Fund of the City of Yonkers. A copy of said Law is annexed hereto and made a part thereof and marked Exhibit "A".

64 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Twelfth.—That upon information and belief that on or before the 4th day of March 1933, the First National Bank and Trust Company in Yonkers had the authority to pledge its assets to secure public money in the State of New York.

Thirteenth.—That prior to the 20th day of March 1933, the City of Yonkers maintained a general deposit account and numerous other accounts including the Police Pension Fund account in the First National Bank and Trust Company of Yonkers.

65

Fourteenth.—That prior to the 20th day of March 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as security for the repayment of its deposits with said bank as more clearly shown by Plaintiff's Exhibit "A", except as hereinbefore denied.

Fifteenth.—That pursuant to Section 69 of the Second Class Cities Law, Chapter 55 of the Laws of 1909, and amendments thereto, the Board of Estimate and Apportionment had the authority to designate depositories for
66 the City of Yonkers, a copy of which section is attached hereto and made a part hereof, and marked Exhibit "B".

Sixteenth.—That on or about the 10th day of July, 1929 said Board of Estimate and Apportionment of the City of Yonkers designated the First National Bank of Yonkers and the Yonkers Trust Company and others as depositories and fixed the rate of interest to be received, including the Police Pension Fund, by the City Treasurer of Yonkers. A certified copy of said resolution is hereto attached and made a part hereof and marked Exhibit "C".

Answer as Amended by Stipulation, Dated November 24, 1937.

Seventeenth.—That upon information and belief that on or about the 30th day of September 1929, the Yonkers Trust Company and the First National Bank of Yonkers merged and said merger is filed in the office of the Register of Westchester County in Liber 10 of Miscellaneous Records.

Eighteenth.—That the Police Pension Fund of the City of Yonkers was a public fund of said City.

As a Second, Separate and Complete Defense Hereto, the Defendants Further Allege:

Nineteenth.—The allegations contained in said answer numbered "SIXTH" to "FIFTEENTH" inclusive, are herein re-alleged, with the same force and effect as if stated.

Twentieth.—That the defendants at no time as alleged in the said complaint maintained an account known as the Police Pension Fund in the plaintiff bank.

Twenty-first.—That the City Treasurer of the City of Yonkers maintained an account in the said bank designated as the Police Pension Fund of the City of Yonkers, prior to the 20th day of March 1933.

Twenty-second.—That the said First National Bank and Trust Company accepted said deposit designated as the Police Pension Fund of the City of Yonkers as public money of the City of Yonkers and pledged its security for the repayment of the same.

70 *Answer as Amended by Stipulation, Dated November 24, 1937.*

As a Third, Separate and Complete Defense Thereto, the Defendants Further Allege:

Twenty-third.— The allegations contained in said answer numbered "SIXTH" to "NINETEENTH" inclusive are herein re-alleged with the same force and effect as if stated.

Twenty-fourth.—That upon information and belief that
71 on the 20th day of March 1933, the City of Yonkers held securities for its deposits including the Police Pension Fund of the City of Yonkers, negotiable bonds in the sum of $535,000.00 of the First National Bank and Trust Company of Yonkers.

Twenty-fifth.—That upon information and belief that there was on deposit with the said bank on the 20th day of March 1933 moneys belonging to the City of Yonkers in deposits, including the Police Pension Fund, the sum of $328,026.04.

Twenty-sixth.—That upon information and belief that
72 prior to the second day of May 1933 Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers, including the Police Pension Fund.

Twenty-seventh.—That upon information and belief the said release of City deposits, including the Police Pension Fund, was made pursuant to instructions of the Comptroller of Currency of the United States, or his deputies.

Twenty-eighth.—That upon information and belief that the said City deposits, including the Police Pension Fund,

were released only after the opinion was given to the Conservator, Percival W. Trudeau by his attorney. 73

Twenty-ninth.—That the said City of Yonkers relying upon the voluntary return of all moneys of the said City of Yonkers surrendered to the Conservator of the First National Bank and Trust Company the aforesaid securities in the sum of $535,000.00.

Thirtieth.—That said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back. 74

As a Fourth, Separate and Complete Defense Thereto, Defendant Further Alleges:

Thirty-first.—That the aforesaid payments to the Firemen's Pension Fund were voluntary payments and at the time of said payments the First National Bank & Trust Company of Yonkers was not insolvent.

Wherefore, defendants demand judgment dismissing the complaint, together with costs and disbursements of this action. 75

Leonard G. McAneny,
Corporation Counsel,
Attorney for Defendants,
City of Yonkers, N. Y.

(Duly verified by Joseph F. Loehr, James E. Hushion and Dennis M. Morrissey on February 28, 1936.)

76

Exhibit A, Attached to Answer.

Local Law No. 1.—1931.

(Printed as part of Defendants' Requests for Findings of Fact and Conclusions of Law at pp. 109 to 118.)

Exhibit B, Attached to Answer.

77

Section 69, Second Class Cities Law.

Laws 1909, Chapter 55.

(Omitted for brevity.)

Exhibit C, Attached to Answer.

78

Certified Copy of Resolution of Board of Estimate.

(Printed as Defendants' Exhibit C at p. 96.)

79

Stipulation Amending Complaint and Answer.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

—*against*—

80

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,
Defendants.

L. 63-189.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include 81 therein a paragraph as follows:

"Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered 'Thirteenth'."

The attorney for the defendants stipulates and agrees that in consideration of the above consent by the attorney for the plaintiff that the plaintiff may, upon the trial of this action, present proof that the payments referred to in paragraph numbered "Thirteenth" of the complaint occurred from and after the 3rd day of March, 1933 and the

82 *Bill of Exceptions.*

said complaint and answer are hereby deemed to have been amended accordingly.

Dated, November 24, 1937.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

H. E. GARRITY.

83

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

84

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

BE IT REMEMBERED, that at a stated Term of the District Court of the United States for the Southern District of

New York, on January 4 and 5, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of 86
the City of Yonkers, MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel, and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendants.

Mr. Moore: The jury in this case is waived.

The Court: The stenographer will note the stipulation then.

Mr. Moore: This is the same type of action except it involves the Police Pension Fund of the City of Yonkers, 87
instead of the Firemen's Pension Fund.

Mr. Downey, will you take the stand.

Mr. McAneny: Will you put in the same stipulation about the order amending the answer that was put in the previous case?

Mr. Moore: Yes.

88 *Walter F. Downey, Plaintiff—Direct.*

WALTER F. DOWNEY, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Mr. Moore: I am offering in evidence the certificate of Mr. Downey's appointment. That is consented to by Mr. McAneny. There was no objection in the other case, and we will have it marked in this case.

89 (Marked Plaintiff's Exhibit No. 1.)

Q. Mr. Downey, did you qualify as Receiver of the First National Bank and Trust Company of Yonkers and are you now acting as such receiver? A. Yes.

Q. Are you in charge of the liquidation of that bank? A. Yes.

Q. What was the official date of the bank's closing.

Mr. McAneny: I object to that on the same ground. I object to it upon the ground that it calls for a conclusion of the witness. I think he should state the facts.

90 Mr. Moore: I withdraw that question. I think I did withdraw it the last time.

Q. You are familiar with the books and records of the First National Bank and Trust Company of Yonkers, are you, Mr. Downey? A. Yes, to the degree that a person can be, having been there since the 15th or 16th of November—the 15th of November.

Q. Do you know from an examination of the books and records of that bank what the official date of the bank's closing was?

91

Mr. McAneny: I object to that as calling for a conclusion of the witness.

Mr. Moore: He is in charge of the books and records there, your Honor.

Mr. McAneny: I will object to it because we stand upon the fact that you have not proved any insolvency as far as we are concerned. You cannot ask these leading questions that call for conclusions.

Mr. Moore: You admitted in the answer the appointment of the Receiver on January 24, 1934; is that correct?

92

Mr. McAneny: We admit a receiver was appointed.

Mr. Moore: I am going to ask the Court to take judicial notice of the fact that the Comptroller does not appoint a receiver for a closed national bank unless it is insolvent.

Mr. McAneny: No.

The Court: The third paragraph of the complaint states and it is not denied that on March 9, 1934 a duly appointed Conservator was appointed of the said First National Bank who took possession of the company and acted until July 24, 1934.

93

Mr. McAneny: It is denied on information and belief.

The Court: I do not see that it is. I do not think the answer denies the third paragraph.

Mr. Romm: The third paragraph is admitted.

The Court: It says also that the Comptroller became satisfied as to insolvency and he was appointed receiver of the bank on the 23rd of January, 1934.

Mr. McAneny: I think that allegation was denied in another case. That admission is only as to the appointment of such official under the law itself. It has to be proved.

94 *Walter F. Downey, Plaintiff—Direct.*

The Court: The Comptroller has the right under the law, I suppose, to declare an institution insolvent, and if the Comptroller has become satisfied as to the insolvency of the bank he appoints a receiver? Isn't that true as to insolvency?

Mr. McAneny: I admit that the Comptroller had become satisfied in 1934 and we concede that so far as the opinion of the Comptroller is concerned as to the propriety, and so forth, the appointment of conservators and receivers was made. We concede
95 as to those facts, but we do not concede insolvency as to the payments made in connection with the facts set forth in this case.

In other words, I believe that when the Comptroller of the Currency acted with respect to a national bank he deems it insolvent and appoints a conservator or a receiver. So far as the depositors of that bank may be concerned, they might be bound and would have no right to withdraw their funds or to take any action contrary to the law or to the powers of the conservator or receiver. I would say that the depositor in a national bank when he makes his deposit assumes that situation. But after moneys
96 have been paid out and conditions have been changed with respect to the parties involved in the paying out of the moneys and then a suit is brought to recover these moneys back, I do not see any authority in the conservator or receiver to recover unless there is an actual insolvency. We have never admitted that this bank is insolvent or was insolvent, and I do not believe it is. No receiver was appointed until long after the moneys were paid out on these checks.

Q. Was there a first dividend of 40 per cent made available to the general depositors on December 16, 1933? A. Yes.

Q. Was a second dividend of 10 per cent made available to the general depositors on November 3, 1937? A. Yes.

Mr. Moore: I want to read into the record Section 2 of Article XI, which is Chapter 452 of the Laws of 1908, Laws of the State of New York.

Mr. McAneny: I believe that counsel is reading from an obsolete publication of the law. I think that the law itself has been amended since the time that this was printed. A Local Law was passed. He is reading an obsolete section of the law.

Mr. Moore: I am going back to the beginning of 98
the law and then I am going to read the last amendment.

Mr. McAneny: But you are not reading the intermediate parts.

Mr. Romm: If you want to read it in evidence, go ahead.

Mr. McAneny: That is not the law at the present time.

Mr. Moore: Section 2 of Article XI, constituting Chapter 452 of the Laws of New York for the Year 1908 reads as follows:

(Omitted for brevity; may be found in Public Laws.) 99

I want to read Sections 1 and 2 of Local Law No. 1 of 1931 of the City of Yonkers. Section 1 reads as follows:

(Printed as part of Defendant's Requests for Findings of Fact and Conclusions of Law at pages 109 to 113.)

Mr. McAneny, will you concede that the office of the City Treasurer of the City of Yonkers was abolished by Article III-A, Section 1, Chapter 667, Laws of New York, 1933? Then I won't have to read it in evidence.

100 *Walter F. Downey, Plaintiff—Cross.*

John B. Power, for Plaintiff—Direct.

Mr. McAneny: Was not it consolidated?

Mr. Romm: It says abolished in the statute.

Mr. McAneny: I will concede that subject to the reading of the law.

Mr. Moore: That will obviate my reading the law. But it is stated for the purpose of the record that Article III-A of Chapter 667 of the Laws of 1933 abolishes the office of City Treasurer of the City of Yonkers.

101 That is all, Mr. Downey.

Cross examination by Mr. McAneny:

Q. Mr. Downey, you were not connected with the First National Bank and Trust Company of Yonkers in any capacity prior to November, 1937, were you? A. November 15th.

Q. What is that? A. I was not connected with the First National Bank and Trust Company of Yonkers prior to November 15, 1937.

Q. These dates that you testified to are not of your own knowledge, but they are information that you have received; 102 is that so? A. Oh, no. The records of the bank will reflect that and also correspondence of the Division of Insolvent National Banks, Bureau of the Comptroller of the Currency.

JOHN B. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. What is your present employment? A. Clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, New York, in liquidation.

103

Q. Were you employed by the First National Bank and Trust Company of Yonkers? A. Yes.

Q. For how long? A. Since October 1, 1929.

Q. What position did you hold with that bank? A. Assistant cashier.

Q. Did you continue in the employment of the conservators and of the receivers? A. Yes, sir.

Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. On Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

104

Mr. Moore: At this time I want to offer in evidence a copy of the Proclamation of the Governor of the State of New York closing all banks of the State on March 4, 1933, and an additional Proclamation of the Governor on March 6th. These have both been marked in evidence in the other case. Is that all right?

Mr. McAneny: Yes.

Mr. Moore: No objection to them.

(Marked Plaintiff's Exhibits 2 and 3.)

105

Q. Until what date did the bank continue closed for all business? A. Until March 10, 1933.

Q. Was any business at all transacted between March 4th and April 9th, inclusive? A. No.

Q. Did the bank ever reopen for regular business? A. No.

Q. I show you a ledger here and ask you to tell us what that ledger is (handing to witness)? A. It is a depositors' ledger of the First National Bank and Trust Company of Yonkers.

Q. With respect to what fund? A. Showing the account of the Police Pension Fund, City of Yonkers.

106 *John B. Power, for Plaintiff—Cross.*

Mr. Moore: I would like to have it marked for identification.

(Marked Plaintiff's Exhibit 4 for identification.)

Q. Was Plaintiff's Exhibit No. 4 marked for identification regularly made in the regular course of the bank's business? A. Yes.

Q. Was it the regular course of the bank's business to have these records made on the date when the transactions described to them occurred? A. Yes.

107 Mr. Moore: I offer this book in evidence now, the portions dealing with the Police Pension Fund (handing to Mr. McAneny).

(Discussion between Counsel off the record.)

The Court: What is the date of that?

Mr. Moore: March 2, 1933.

Mr. Romm: To October 6, 1933.

Mr. Moore: I am offering those pages in evidence.

The Court: Received.

(Plaintiff's Exhibit 4 for identification received in evidence.)

108 Mr. Moore: You may examine, Mr. McAneny.

Cross examination by Mr. McAneny:

Q. Mr. Power, the entries in this account, what do they show? A. Show the debits and credits.

Q. They show moneys received by the bank into that account and moneys paid by the bank out of the account; is that so? A. Yes.

Q. Were the moneys paid into that account paid by the City of Yonkers? A. I could not swear to that.

Q. You so testified in the last case. A. Moneys paid in the bank?

Q. Yes, into this account. Who were they received from? A. I do not understand that. Deposits would probably be received by the Police Pension Fund.

Q. I thought you testified before that they were paid into this account by the City of Yonkers.

The Court: He testified that the checks were made by the City of Yonkers.

Q. You say you cannot so testify now? A. No.

Q. You do not know who paid the moneys into the account? A. No. 110

Q. Didn't you see the checks that were deposited into that account? A. Checks deposited in the account?

Q. Yes. A. No.

Q. You did not keep this book? A. No.

Q. Who did keep it? A. The bookkeeper.

Q. What is the name? A. I could not swear at this time what his name is.

Q. Can you tell me one of two or three people? A. Mr. Spyce was a member of the bookkeeping department.

Q. You are familiar with the records of the bank but you do not know who kept that particular book? A. Not that particular book.

Q. Is there any other record of the bank that you do not know personally who kept it? A. I could not swear which book certain associates kept. I am familiar with the records. 111

Q. What is that? A. I am familiar with the records.

Q. All you know about it is that this is a book? A. It is an individual ledger of the First National Bank.

Q. You did not keep the book or put those items into it, did you? A. No.

Q. There was somebody else that did, wasn't there? A. Yes.

112 Q. There is somebody that could testify as to where these moneys came from? A. I won't answer that question.

Q. You won't answer it?

The Court: You mean you cannot answer?

The Witness: I cannot answer it.

Q. You can answer it? A. I cannot.

Q. There is absolutely no means that we might have to determine from whom the moneys came that went into that account? A. Yes, there is means.

113 Q. What is the means? A. Somebody that ran that particular ledger.

Q. That person is alive now, isn't he? A. I believe so. I do not know.

Q. But he is not in court, is he? A. No.

Q. Do you know where he is? A. No.

Q. So you do not know who kept this book? A. Not that particular book, no.

Q. How do you know that is the book of the bank? A. I worked there during those years. I have seen it in the bank and examined it several times.

Q. Did you ever see anybody working on it? A. Yes, I did.

114 Q. Who worked on it? A. Different people.

Q. Can you tell me who they were, what their names were? A. Mr. Spyce, he was the head of the department. There was a young lady named Muriel Woodruff and Miss Cochrane.

Q. Mr. Spyce is employed by the new First National Bank? A. Yes.

Q. The new First National Bank is in the same building? A. Yes.

Q. In the same banking building? A. No. He is in the downstairs office of the First National Bank in Yonkers, the same bank building.

Q. You have testified here that you knew that the entries on that book were made on the same day transactions came into the bank. A. No, it was the custom.

Q. It was the custom? A. Yes.

Q. What do you know about the custom? A. Because I worked there.

Q. What did you work on? A. Assistant cashier.

Q. Did you work on any books? A. I did several years ago.

Q. What books did you work on? A. Books, including from 1919 to 1930, not the First National Bank and Trust Company, but the First National Bank of Yonkers.

Q. Tell me about the items showing money paid out of that account. Where did the records come from from which each of those entries were made? A. From checks.

Q. Will you look at these checks and tell me if those are the original entries in the bank records from which those entries were taken?

Mr. Romm: Individual checks?

Mr. McAneny: Yes.

The Court: You have called on the witness as to the checks. Let him examine them. Over 100. It takes a long time to examine them.

Mr. Moore: While you examine them, I will call Mr. Vanvick.

(Witness temporarily excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, have you been sworn? A. Yes, sir.

118 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. Are you employed by Walter F. Downey as Receiver of the First National Bank and Trust Company of Yonkers? A. I am.

Q. In what capacity? A. Auditor in charge of the books and records and matters relating to the claims.

Q. How long have you been an auditor in the receivership? A. Since April 16, 1934.

Q. What is your experience as auditor? Give it to us as you gave it before.

The Court: Do you need to qualify him again?

119 Mr. Moore: Do you object to his qualification, or do you want him to repeat it?

Mr. McAneny: No, I do not object.

Mr. Moore: He does not object to his qualifications. I will go on.

Q. You are familiar with the books and records as they stand now, the Receiver's records? A. Yes.

Q. What is the official date of the bank's closing, as disclosed by the records? A. March 3, 1933.

Mr. McAneny: May I have that last question?

(Record read by the stenographer.)

120

Mr. McAneny: I object to that as calling for a conclusion.

The Court: Sustained.

Mr. McAneny: I move to strike out the answer.

The Court: Granted.

Q. Do you know the date of the official closing of the bank?

Mr. McAneny: I object to that on the same ground.

The Court: He may say, if he knows. He was not there until the next year.

Mr. Moore: Will you let him state whether he knows or not?

The Court: Yes.

Q. Do you know what the official date of the closing of the bank was? A. Yes, March 3rd.

Mr. McAneny: I object to that and move to strike out the answer.

The Court: It calls for yes or no. 122

Mr. McAneny: The answer should be yes or no.

Q. Do you know? A. Yes.

Q. What date was it?

Mr. McAneny: I object to that on the ground he is not qualified. He has not shown that he was present or connected with the bank. It also calls for a conclusion of the witness. The closing of the bank is a legal matter, not a question of fact.

The Court: This calls for his personal knowledge, not what some books may state, Judge.

123

Q. You are actively engaged now in assisting the Receiver in the liquidation of that bank, are you, Mr. Vanvick? A. Yes, sir.

Q. As of what time are the claims of general depositors calculated and allowed? A. March 3, 1933.

Q. As of what date are set-offs calculated and allowed? A. March 3, 1933.

Q. As of what date is interest on interest-bearing deposits allowed? Up to what time was interest allowed? A. Up to March 3, 1933.

Q. Are you familiar with the ledgers and records of the bank? A. Yes.

Q. Do the bank records show a deposit account maintained under the caption of Police Pension Fund? A. Yes, there were two accounts.

Mr. McAneny: I did not get that answer.

Mr. Moore: He said there were to such accounts.

Mr. McAneny: Two such accounts.

Q. Is that your answer? A. Yes.

Q. Were the accounts interest-bearing checking accounts? A. I cannot answer that, as the ledger does not show any interest credits.

Q. What is the balance, together with the accrued interest, in the two accounts on March 3, 1933? A. The aggregate amount was $29,283.67.

Q. How much of that was in the first account and how much in the second account? A. One account was for $50.

The Court: $50?

The Witness: Yes.

A. (Continuing) The other account, $29,233.67.

Q. When did the first withdrawal from the $50 account occur after March 3, 1933? A. The ledger shows October 26, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest due on that withdrawal?

Mr. McAneny: I object to the word "due."

Q. What is the interest on that withdrawal computed from the time of its withdrawal down to the present time? A. I compute it to be $7.66.

Q. On what basis do you calculate the interest? A. Interest at 6 per cent on $50 from October 26, 1933 to December 16, 1933; then on 60 per cent or $30, from December

16, 1933 to November 3, 1937; then on 50 per cent, or $25, from November 3, 1937 to January 3, 1938.

Q. Have you used the same basis in all of your interest calculations? A. Yes, sir.

Q. When did the first withdrawal from the $29,233.67 account occur after March 3, 1933? A. On March 10, 1933.

Q. How much was withdrawn from the account on that date? A. $50.

Q. What is the interest on that withdrawal? A. $9.55.

Q. Did you compute that the same as on the last withdrawal, the same way that the interest on the last withdrawal was computed? A. Yes. 128

Q. You have used the same method in your computations on all of these withdrawals? A. Yes.

Q. When did the next withdrawal from the account occur?

The Court: You are going to do that as you did before?

Mr. Moore: I am going to have him read them all out, the same as he did before.

The Court: All right. State the other withdrawals.

Q. Give the date of the withdrawal and the amount of interest up to the present time, computed as you have told us you computed it in the two cases I have called your attention to and concerning which you have testified. 129

The Court: The separate items are important?

Mr. Moore: A great many items were drawn out on one date. There are not so many.

The Court: Do the questions of the dates and the separate withdrawals matter? The question is the total that we are concerned with.

Mr. Moore: We get the total in the end.

130 *Carl H. Vanvick, for Plaintiff—Direct.*

The Court: I thought we could shorten it further. The totals include the computation made, as he said, from March 3rd down to October for withdrawals and interest as you have stated. You can save time.

Mr. Moore: The next one is March 16th.

The Court: I did not know whether the items were of any importance.

Mr. Moore: Yes, I think it is important to put it in this way.

The Court: All right.

131 Q. March 16th is the next withdrawal? A. March 13th.

Q. Go ahead and tell us about it. A. Withdrawal of $50; interest computed to be $9.52.

March 16, 1933, withdrawals of $216.67; interest computed to be $41.15.

March 17, 1933, withdrawals of $150.00; interest computed to be $28.48.

March 18, 1933, withdrawals of $100.00; interest computed to be $18.97.

March 20, 1933, withdrawals of $283.33; interest computed to be $53.64.

March 24, 1933, withdrawals of $237.50; interest
132 computed to be $44.80.

March 29, 1933, withdrawals of $50.00; interest computed to be $9.39.

March 30, 1933, withdrawals of $266.67; interest computed to be $50.01.

April 1, 1933, withdrawals of $2,681.26; interest computed to be $502.33.

April 3, 1933, withdrawals of $1,489.58; interest computed to be $278.58.

April 4, 1933, withdrawals of $494.79; interest computed to be $92.45.

April 5, 1933, withdrawals of $808.32; interest computed to be $150.90.

April 6, 1933, withdrawals of $370.84; interest computed to be $69.17.

April 7, 1933, withdrawals of $87.50; interest computed to be $16.31.

April 8, 1933, withdrawal of $50.00; interest computed to be $9.31.

April 10, 1933, withdrawals of $145.83; interest computed to be $27.11.

April 11, 1933, withdrawals of $250; interest computed to be $46.42.

April 15, 1933, withdrawal of $50; interest computed 134
to be $9.25.

April 17, 1933, withdrawals of $137.50; interest computed to be $25.40.

April 24, 1933, withdrawals of $141.67; interest computed to be $26.01.

April 29, 1933, withdrawal of $50; interest computed to be $9.14.

May 1, 1933, withdrawals of $2,280.21; interest computed to be $415.95.

May 2, 1933, withdrawals of $1,206.24; interest computed to be $219.84.

May 3, 1933, withdrawals of $16,788.28; interest computed to be $3,056.94. 135

May 4, 1933, withdrawals of $300; interest computed to be $54.58.

May 5, 1933, withdrawals of $316.67; interested computed to be $39.37.

Withdrawals of $216 or $316—$216.67; interest computed to be $39.37.

May 6, 1933; withdrawals of $50; interest computed to be $9.08.

May 9, 1933, withdrawal of $50; interest computed to be $9.06.

May 10, 1933, withdrawals of $104.17; interest computed to be $18.86.

136 *Carl H. Vanvick, for Plaintiff.—Cross.*

John B. Power, Recalled—Cross.

May 15, 1933, withdrawals of $50; interest computed to be $9.01.

July 26, 1933, withdrawal of $1.64; interest computed to be $0.28.

October 26, 1933, withdrawal of $25; interest computed to be $3.83.

Q. Does that complete the account? A. That is right.

Mr. Moore: You may ask, Mr. McAneny.

137 *Cross examination by Mr. McAneny:*

Q. You used the word "withdrawal". You mean moneys paid by the bank on checks which appear from the debit side of the book which was testified to previously? A. Yes.

Mr. McAneny: That is all.

(Witness excused.)

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138 JOHN B. POWER, resumed the stand.

Mr. Moore: Are you ready, Mr. Power?
The Witness: Yes.

Cross examination continued by Mr. McAneny:

Q. Have you examined those checks that I showed you, Mr. Power? A. I have.

Q. Are those the checks from which the entries were made concerning the books you have testified to? A. Yes.

Q. How are those checks arranged there? What are their dates? A. The date of the checks?

Q. Yes. A. The first check is March 31, 1933 through to and inclusive of May 2, 1933.

Carl H. Vanvick, Recalled—Direct. 139

Q. Do each of those checks bear a stamp on the reverse side showing the date upon which it was paid by the bank? A. No.

Q. Do any of them? A. Some of them; not all of them.

Q. How many do not? A. Seventeen.

Q. How many checks are there altogether? A. I counted 147.

Q. With the exception of 17 all bear on the back the imprint showing the date on which the bank paid the money on them? A. It is a perforation.

Q. Moneys paid on those checks were paid to the holders of the checks; is that right? A. Yes. 140

Mr. McAneny: I would like to offer these checks in evidence as one exhibit.

Mr. Moore: May I take them and look them over?

(Checks handed to Mr. Moore.)

The Court: Is there anything further with this witness?

Mr. Moore: No, I think not, but I would like to recall Mr. Vanvick for one question.

Mr. McAneny: Nothing further.

(Witness excused.) 141

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the plaintiff, further testi-

Direct examination by Mr.

Q. Mr. Vanvick, will you now give us withdrawals and the interest as you found it to be A. The total withdrawals were $29,283.67, and the computed interest $5,372.35.

142 *Carl H. Vanvick, Recalled—Direct.*

Q. Did you check up on the first column the added withdrawals upon the Police Pension Fund in the closed national bank of the receiver?

Mr. McAneny: May I have that question?

(Question read by the stenographer.)

Mr. McAneny: I object to that question.

The Court: I think the form is perhaps improper. It shows the total.

Mr. Moore: The total is there.

143 The Court: $5,000 interest and $29,000 total.

Mr. Moore: Mr. McAneny, as in the other case, will you stipulate during the existence of the Police Pension Fund the bank pledged to the City of Yonkers for the security of the repayment of the account, as security for the repayment of certain other accounts bank assets consisting of various bonds?

Mr. McAneny: Yes.

(Paper marked Defendants' Exhibit A.)

Mr. Moore: This is offered in evidence by consent.

The Court: What is that?

144 Mr. Moore: It is Plaintiff's Exhibit 5 in this case.

(Marked Plaintiff's Exhibit No. 5.)

Mr. Moore: Will you stipulate for the record, Mr. McAneny, that the pledged assets by the First National Bank and Trust Company of Yonkers, New York, to secure the Police Pension Fund deposit account as shown by Plaintiff's Exhibit No. 5 in evidence was not made pursuant to or under the statute of the State of New York, or was not made pursuant to or under any local law or ordinance of the City of Yonkers?

Mr. McAneny: No, I won't stipulate that.
Mr. Moore: The plaintiff rests.

Mr. McAneny: I move to dismiss the complaint on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank 146
in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to the City of Yonkers, require that before a claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but 147
to outside parties, and having honored the checks, having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparenty on the ground of insolvency. I do not know of any other grounds. And having failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint.

148 *Motion to Dismiss the Complaint.*

The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a
149 claim of the character we are suing on.

The Court: They do not specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims?

Mr. Rosenwasser: Section 244 of the Second Class Cities Law of the State of New York reads as follows:

150 (Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that that specifically applies to injuries to persons or property arising from negligence.

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or rather, after the claim has been approved by a head of the department or officer of the city who hired the claimant. In other words, by those words it could not possibly apply to the plaintiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would 152
approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there 153
has been a due demand. That is denied absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever and, furthermore, you proved no due demand under the law.

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of Thomann *v.* The City of Rochester, 256 N. Y. 165, disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue.

We further argue that there has been no insolvency shown, as against the defendants in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that it was paid out while it was actually insolvent. We do not admit that the bank was ever

insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendant's case. It probably won't be very long. 158

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

STEPHEN A. ROAKE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

159 Q. Mr. Roake, are you an official of the City of Yonkers? A. Yes.

Q. Holding a position in the City? A. Yes, sir.

Q. What position do you hold? A. Assistant cashier, Department of Finance.

Q. How long have you held that position? A. Since 1923 to——

Q. Continuously? A. Continuously.

Q. Continuously since the year 1923; is that right? A. That is right.

Q. Who in the office of the Finance Department of the City has charge of the cash records of the Police Pension Fund of the City of Yonkers? A. I have.

160 *Stephen A. Roake; for Defendants—Direct.*

Q. How long have you had charge of those records? A. Since that time, December, 1923.

Q. You are acquainted with all transactions, cash transactions, covering that fund, and with the records of the office covering that fund; is that so? A. Yes, sir.

Q. In what bank was the cash of the Police Pension Fund kept? A. In 1933?

Q. Yes. A. In the First National Bank.

Q. First National Bank and Trust Company of Yonkers? A. First National Bank and Trust Company of
161 Yonkers.

Q. Prior to March 3, 1933, will you tell us what was the last deposit made in that account? A. The last deposit was made——

Q. Have you a check to show that? A. I haven't the check in my hand.

Q. I hand you this check and ask you if that check covers such a deposit? A. Yes, sir.

Q. When was that check deposited? A. February 28, 1933.

Q. What is the amount of that check? A. $27,447.76.

Q. And that money went into that fund, is that correct? A. Yes, sir.
162

Mr. McAneny: I ask to have that check marked in evidence.

Mr. Moore: Let me see it.

(Check handed to Mr. Moore.)

Mr. Moore: That is all right.

(Marked Defendants' Exhibit B.)

Q. When that check was deposited in the account what was the blaance of the account? A. Balance on February 28th after that check was made was $32,874.26 in one account and $50 in another account.

Q. There were no further deposits made subsequent to that date in either of these accounts, were there? A. No, sir.

Q. From what fund was this check that you have identified drawn?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: What is the question?

Mr. McAneny: From what fund did the City pay the check.

The Court: What fund it paid it out of?

Mr. McAneny: Yes. 164

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: Do you know yourself what fund paid that?

The Witness: Yes; paid from the City of Yonkers General Fund.

The Court: Overruled. You may answer.

Mr. Moore: Exception.

Q. I ask you what the moneys covered by that check represent?

Mr. Moore: I object to that as incompetent, 165 irrelevant and immaterial, your Honor.

Q. (Continuing) If you know. You had charge of the cash accounts, didn't you? A. Yes.

Q. What did that check represent?

The Court: He says they were paid out of the general fund.

Mr. McAneny: I am asking for what purpose and under what authority it was paid into this Police Pension Fund.

66 *Stephen A. Roake, for Defendants—Direct.*

The Court: That brings up the provision of the act by which they were paid? Is that so?

Mr. McAneny: There were various provisions of the Act whereby the City pays certain sums which it deducts from salaries; whereby the City pays certain sums covering the deficit. I am asking what this sum represented.

The Court: I will let him say. How it was contributed?

Mr. McAneny: Yes.

67 Mr. Moore: I except.

The Court: You may have an exception.

A. That check represents the City's contribution for 1932, being 3 per cent or one and one-half times the amount contributed by the members of the Police Department.

Q. It was deposited pursuant to the Local Law? A. Yes.

Mr. Romm: I object to that question.

The Court: Sustained.

Mr. Romm: I move to strike out the answer.

The Court: Strike it out.

68 Q. I ask you to look at these checks which I show you, Defendants' Exhibit A. Do those checks represent moneys paid from the Police Pension Fund into the First National Bank and Trust Company of Yonkers? A. Yes, sir.

Q. Can you tell me for what purpose those checks were issued?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial. I think the checks speak for themselves.

Mr. McAneny: It certainly is not incompetent, irrelevant and immaterial. We have the right to get the facts in the record.

Mr. Moore: The checks speak for themselves.

The Court: The purpose for which they are issued is another thing. He can state the facts, that is true. What do those checks show or represent? What funds do they represent?

Q. Were they paid out? A. It is the pension fund, paid out to pensioners, with one exception.

Q. What is that exception? A. The last check.

Q. What is that check? A. It is a check payable to the Police Pension Fund or withdrawal from the balance in the bank on May 2nd. That was deposited——

170 Mr. Moore: I object to the bank where it was deposited.

The Court: Overruled.

Mr. Moore: Exception.

The Court: He has answered and said that that one is not included. Did you say that?

The Witness: Not included—it is included with payments made by the fund, but it is not a pensioner, paid to a pensioner. It is payable to the fund itself from the First National Bank to another bank.

Q. What bank was that?

171 Mr. Moore: I object to it as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. McAneny: Exception.

The Court: It was just transferred to another bank, I suppose.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Will you please examine Defendants' Exhibit B in evidence and state whether or not there is anything in that exhibit which in any way indicates the origin of the moneys represented by that check? A. City of Yonkers funds.

72 *Stephen A. Roake, for Defendants—Cross.*

Q. Is there anything on that exhibit which indicates that it is the City of Yonkers fund?

Mr. McAneny: You are asking for a conclusion there, it seems to me. It speaks for itself.

Mr. Moore: I am asking with respect to these exhibits.

The Court: I will let him answer.

A. City of Yonkers check, drawn on the City of Yonkers account.

73 Q. How do you know that? A. It so says on the check, signed by the Treasurer and countersigned by the Comptroller of the City of Yonkers.

Q. What is the name of the Comptroller appearing on that exhibit? A. James J. Hushion.

Q. In addition to being Comptroller of the City of Yonkers he was also a trustee of the Police Pension Fund? A. He was.

Q. What name appears above his name as Treasurer? A. G. W. Klein.

Q. In addition to being Treasurer of the City of Yonkers G. W. Klein on February 28, 1933 was also Treasurer 74 of the Board of the Police Pension Fund?

Mr. McAneny: I object to that unless the witness knows, because he is asked a question——

Mr. Moore: He will answer whether he knows. If he does not know, he will tell us.

Mr. McAneny: Why not ask him something that he does know?

The Court: What is the question?

(Question read by the stenographer.)

Q. (Continuing) Wasn't he? A. I cannot answer that question in that way.

Q. Did you ever see any checks which bore the legend "Police Pension Fund of the City of Yonkers"? A. I have.

Q. Didn't they state at the top "The City of Yonkers, New York" the same as Exhibit B in evidence, Defendants' Exhibit B in evidence? A. No.

Q. Are you sure of that? A. I am sure of that; yes.

Q. Then is it true that the only way you have of knowing that Defendants' Exhibit B in evidence comes from the general fund of the City of Yonkers is the fact that it bears the caption "The City of Yonkers, New York"? Is that correct? A. Yes, it is a City of Yonkers check. 176

Q. Is that the only basis upon which you said that the funds represented by that check come from the general fund of the City? A. Yes.

Q. Did you testify on cross examination that the $27,447.46 represented by Defendants' Exhibit B in evidence constitutes one and one-half times the amount of moneys deducted from the monthly pay in salary of the members of the Police Department of the City? A. Yes, sir.

Q. How do you know that? A. I know that from the records.

Q. Do you have those records here? A. I have one of the cash records of the account here, yes.

Q. What records? A. The cash book account of the 177
Police Pension Fund.

Q. Do they show that this $27,447.76 comes from salaries—rather, it represents one and one-half times the amount deducted from the salaries of members of the Police Department? A. It shows that that is the 1932 contribution by the City.

Mr. Moore: I move to strike out the answer as not responsive.

The Court: It is not responsive. Does that represent the 1½ per cent?

The Witness: It does represent that, yes.

178 *Stephen A. Roake, for Defendants—Cross.*

Q. How do you know that it does represent one and one-half times the amount deducted from the payroll of members of the Police Department? A. Well, from the cash book itself, which claims that is the 1932 contribution.

Q. Have you that cash book here? A. It is here.

Q. Will you produce it, please? A. (Witness hands book to Mr. Moore.)

Q. Have you examined that cash book? A. Yes, sir.

Q. Does the cash book show the total sums deducted from the salaries of members of the Police Department for
179 the year 1932? A. It does, but not in one lump sum.

Q. Can you compute the total from the cash book? A. I can, yes.

Q. How long would it take you to do so? A. I would have to go over the entire year of 1932 and check them up semi-monthly.

Q. Do you have the monthly totals? A. No.

Q. Can you tell us the name of one member of the Police Department reflected in that cash book, any one of them? A. No.

Q. It does not state any one? A. I cannot, no.

Q. How can you possibly state that that cash book will
180 reflect the total payments deducted from members of the Police Department for the year 1932— A. Because the contributions are entered in here semi-monthly as payroll deductions are made.

Q. Who makes the payroll deductions? A. Those deductions are made by the Department, certified by the Department, and made to the Comptroller, and the Comptroller makes the checks out in detail and the 2 per cent deduction is made in one check for the entire payroll and that is turned over to myself and deposited in this fund.

Q. The 2 per cent total is one lump sum? A. That is right.

Q. That is turned over to you? A. Semi-monthly.

Q. Semi-monthly? A. Yes, sir.

Q. Can you show us one entry which indicates any one semi-monthly payment turned over? A. Yes.

Q. Where is that? A. April 23rd, City of Yonkers, 2 per cent of payrolls of February 16th to 28th, $768.32.

Q. Before testifying that the $27,447.76 represents one and one-half times the amount deducted from police payrolls for the year 1932, did you do any computation of any kind? A. I did not, no.

Q. It is true that you do not know whether or not the $27,447.76 actually represents one and one-half times the 1932 deductions from the Police Department payrolls; is that true? A. I do know from my own deductions, from my own conclusions, rather. 182

Q. You do not know from any other source; isnt that true? A. Only from the record.

Q. You did not compute the entries in the book, did you? A. I did not.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

Q. That cash book that you have is one of the books of the City of Yonkers, is it not? A. Yes. 183

Q. One of the official books? A. Yes.

Q. And kept in the office? You used that book to make various calculations with respect to this fund, did you not? A. Only to keep track of the cash deposited in these various funds.

Q. Counsel has brought out that deductions from salaries are covered by a single check turned over to you and deposited. Is that correct? A. Yes, sir.

Q. There are other deposits made in this fund, are there not? A. Yes.

Q. Made by you? A. Yes.

184 *Stephen A. Roake, for Defendants—Re-direct.*

Q. In what form did you make those deposits? A. Those deposits, of course, are made from other sources, such as interest on mortgages, and so on, held by the fund.

Q. Did you receive the other matters, the fines, and matters of that kind? A. Yes.

Q. Did they come in the form of a check? A. They are made by the same deduction from the payroll.

Q. They are turned over to you in the form of a check or checks? A. Yes, sir.

Q. You deposited those in this fund? A. Yes, sir.

185 Q. Can you recollect any other receipts that you received from any source that you put into this account and the manner in which you received it? A. From receipts of the City of Yonkers.

Q. From fines? A. The fines—they are receipts such as the deficits at the end of the year.

Q. And the Local Law, didn't it refer to certain other sources from which moneys were put into this fund, for instance fees paid for testing and inspecting combustibles? How did you receive those? A. I do not recall offhand of receiving any such funds.

Q. How about deductions for loss of time or absences or suspensions from duty? That is taken off the payroll 186 and comes to you in the form of a check from the Department; is that right? A. That is correct.

Q. For loss or stolen moneys remaining in the hands of the Police Department for a period of one year, did you get items of that kind? A. Occasionally, yes, sir.

Q. Was that turned over to you in cash or check or how? A. Sometimes in cash and sometimes in check.

Q. Items like the one I last described and such as various other items under the Local Law; they would go into the General Fund of the City, if there were items——

Mr. Moore: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. McAneny: Exception.

Q. You have examined the checks in Defendants' Exhibit A, have you not?

Mr. Moore: The checks are in front of you there.

A. Yes, sir.

Q. Then you examined these other checks, Defendants' Exhibit B, have you not (handing to witness)? A. Yes, sir.

Q. And they are signed identically; is that so? A. That 188
is correct; yes, sir.

Q. Both drawn on the same bank? A. No.

Q. And both are identically signed by James J. Hushion, Comptroller and Gustav Klein, Treasurer? A. Yes.

Mr. Moore: I object to that. The checks speak for themselves.

The Court: It is true that the checks show that, yes.

Mr. McAneny: That is all.

Mr. Moore: That is all.

The Court: Do you want to go through with these 189
now?

Mr. McAneny: I would like to take a recess, if I may. I get a little tired on account of my eye condition.

The Court: We will adjourn until 10:30 tomorrow.

(Adjourned to January 5, 1938 at 10:30 a. m.)

190 *Gustav W. Klein, Jr., for Defendants—Direct.*

TRIAL RESUMED.

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Klein, are you an officer of the City of Yonkers? A. I am.

Q. What position do you hold? A. Deputy Comptroller, Department of Finance, City of Yonkers, New York.

Q. How long have you had that position? A. Since
191 January 1, 1934.

Q. Prior to January 1, 1934 what position did you hold? A. I was Treasurer of the City of Yonkers.

Q. How long did you hold that position? A. From January 1, 1932 to December 31, 1933.

Q. The office of Treasurer of the City of Yonkers was an elective office, was it not? A. It was.

Q. You were elected by the people to that office? A. That is right.

Q. For two terms? A. For one term.

Q. And then on December 31, 1933 the position of Treasurer was abolished by law, was it not? A. That is true.

192 Q. You were then appointed Deputy Comptroller? A. That is right.

Q. Prior to being City Treasurer, what position did you hold with the City? A. I was not with the City at the time.

Q. You were not with the City prior to that time? A. The last I served with the City was during 1926 and 1927.

Q. What position did you hold? A. Deputy City Treasurer under the then City Treasurer George Griot.

Q. You heard Mr. Stephen Roake testify? A. I did.

Q. He was assistant cashier under you as City Treasurer, was he not? A. He was.

Q. From January 1, 1932 until December 31, 1933; is that right? A. That is right.

193 Q. He was an employee in your department? A. He was.

Q. Under your jurisdiction? A. That is right.

Q. And as City Treasurer, what were your duties? A. The duties were to see, of course, that the tax collections and the money received by the City from various departments were properly placed in the bank and checks had to be countersigned by the Treasurer and then the Comptroller; general supervision of the office of the City Treasurer; and also to see when money was deposited in the bank that the bank properly secured, or we got security from the 194 banks in which these deposits were placed.

Mr. Moore: I object to that and move that the last part of the answer be stricken out.

The Court: What was the question?

(Record read by the stenographer.)

The Court: It may go out. I suppose his duties were fixed by statute.

Mr. McAneny: I take an exception.

The Court: Stricken out, and exception to the defendants.

Mr. McAneny: I would like to offer in evidence a certified copy of the resolution of the Board of 195 Estimate and Apportionment of the City of Yonkers. I would like to read it into the record.

Mr. Moore: I object to the introduction of it. It is not an ordinance or a law, and I object to it as incompetent, irrelevant and immaterial.

Mr. McAneny: It certainly is not incompetent, irrelevant and immaterial, but has a bearing on our case, on part of the proof in the case. It is a certified record. Are you objecting to that?

Mr. Moore: No, but it is not an authorization of law.

Mr. McAneny: It is. I will connect it up with the law.

Mr. Moore: I object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: It is on a question presented in this case. I think it should be received at this time. It may be competent and may not be competent. I cannot determine at this time. I am going to receive it.

Mr. Moore: May we have it marked for identification first?

Mr. McAneny: I would like to read it into the record.

The Court: Just a moment until we get it marked.

(Marked Defendants' Exhibit C.)

The Court: I am going to receive it. I think at the most it might be immaterial if it has not a bearing on the question as to the funds.

Mr. Moore: May I have an exception?

The Court: Yes.

(Mr. Garrity reads Defendants' Exhibit C.)

Mr. Moore: I move to strike out the resolution that has just been offered and read as incompetent, irrelevant and immaterial, and upon the ground that it does not anywhere mention the First National Bank and Trust Company of Yonkers.

Mr. McAneny: I will connect that, your Honor.

The Court: Motion denied.

Mr. Moore: Exception.

Mr. McAneny: I would now like to read into the record a section of the Second Class Cities Law, Sections 69 and 70 of the Second Class Cities Law, which is a law covering the City of Yonkers.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55 as Amended:

(Omitted for brevity.)

Mr. Moore: I move to strike out the two sections that have just been read as incompetent, irrelevant and immaterial. 199

The Court: Are you offering the copy of these acts themselves?

Mr. McAneny: The laws themselves. I am sure that the Court takes judicial notice of the State laws.

The Court: If that were true, a motion to strike out is not necessary.

Mr. Romm: They read it into evidence, that is why the motion is made.

The Court: Motion denied. 200

Mr. Moore: Exception.

Mr. McAneny: I ask counsel for the plaintiff to concede that the Yonkers Trust Company and the First National Bank and Trust Company subsequent to this resolution were consolidated and merged.

The Court: What is the date of that?

Mr. McAneny: And the consolidation agreement filed in the office of the Register of Westchester County. Date of merger is September 30, 1929. Do you concede that?

Mr. Moore: There was another bank, the Bryn Mawr-Nepperhan. Those three were consolidated and became known as the First National Bank and Trust Company of Yonkers on September 30, 1929. 201

Mr. McAneny: The consolidated bank, you will concede, assumed all the obligations of the constituent banks.

Mr. Moore: I cannot concede that. I do not know.

Q. Subsequent to that consolidation, Mr. Klein, did you continue to carry accounts of the City in the First National Bank and Trust Company? A. I did.

202 *Gustav W. Klein, Jr., for Defendants—Direct.*

Q. Will you look at the checks, Defendants' Exhibit A, and will you tell me if that is your signature that appears on each of those checks (handing to witness)? A. Yes; that is my signature on each of those checks.

Q. There is a second signature on each of those checks? A. Yes, there is.

Q. Whose signature is that? A. James J. Hushion, Comptroller.

Q. Do you know his signature? A. Yes.

Q. That is his signature on each one of them? A. I did
203 not look.

Mr. Romm: Just a minute. He says he did not look.

The Court: What is your answer?

The Witness: 74 of these checks were signed by Mr. Hushion and 73 were signed by the deputy, Rayfield E. Marchand.

Q. He was Deputy Comptroller of the City of Yonkers at the time he signed those checks? A. He was.

Q. Will you look at Defendants' Exhibit B, Mr. Klein, and tell me if that is your signature on that check? A. Yes,
204 sir.

Q. Do you recognize the other signatures on that check? A. I do.

Q. Whose signature is that? A. James J. Hushion, Comptroller.

Q. You know his signature? A. I do.

Q. Mr. Klein, I show you a paper produced from the files of the Finance Department of the City of Yonkers and ask you if you can identify that paper? A. Yes, that is a claim.

Q. Is that produced from the files of the City of Yonkers? A. It is.

Q. Is that an original paper? A. Yes, it is.

Q. Was the check which you have just identified as having your signature the last check drawn upon that warrant or that claim?

Mr. Moore: What was that warrant? May we have it marked for identification?

Mr. McAneny: I am trying to connect it.

A. The claim bears No. 170,736, and the check bears the number 170,736; therefore this check is in payment of this warrant. 206

Mr. McAneny: I offer the warrant in evidence.

The Court: Submit it to counsel.

Mr. Moore: Let me see it.

(Marked Defendants' Exhibit D.)

Mr. McAneny: I would like to have it read into the record.

The Court: All right.

(Mr. Garrity reads Defendants' Exhibit D.)

Q. Mr. Klein, you had in your custody as City Treasurer the securities, a list of which has already been placed in evidence in this case; is that a fact? A. Yes. 207

Q. As of March 3, 1933, could you state what the par value of those securities were in your possession? A. The par value of these securities was $535,000.

Q. Part of these securities were returned to the First National Bank and Trust Company of Yonkers or its representatives? A. They were all returned with the exception of $1,000.

Q. Have you receipts for the return of those securities? A. I have.

208 *Gustav W. Klein, Jr., for Defendants—Direct.*

Mr. McAneny: I offer these receipts in evidence.

Mr. Moore: Let me see them.

(Documents handed to Mr. Moore:)

Mr. Moore: No objection.

(Marked Defendants' Exhibit E.)

Q. Did you see these receipts signed by the Conservator? A. I saw some of them signed by him. I do not remember if I saw them all signed.

209 Q. Do you know his signature? A. I think I do.

Q. You have seen him write? A. Yes.

Q. Is that his signature on all of those documents? A. I would say it is.

Q. Prior to September 30, 1929, when the First National Bank and Yonkers Trust Company merged, did the City have deposits in either of those banks?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, your Honor.

The Court: I do not see how it is material. What is your point?

Mr. McAneny: They were put in evidence; the

210 plaintiff has put in evidence a list of $535,000 worth of securities, and we certainly have a right to show, since he has put them in evidence, what they covered and the history of the transactions. That is my only reason for saying that I believe we have a right to go into these facts. It all concerns the pledge of these assets and it is relevant, I think.

Mr. Moore: That was before the time we came into this picture, your Honor.

The Court: That was back in 1929.

Mr. McAneny: That may be so, but they put in evidence these securities, and I intend to show that

the securities were carried on, and I think I have a right to show that.

The Court: These securities were delivered to the First National Bank and Trust Company, I suppose, subsequent to 1929.

Mr. McAneny: Oh, no. No, I will show they were in the possession of the City before 1929 and were carried there.

The Court: At the time this bank was not named as a depository.

Mr. McAneny: The constituent banks were. 212

The Court: The constituent banks, not all of them. I will receive it.

Mr. Moore: Exception.

The Court: What is the question?

(Question read by the stenographer.)

Mr. McAneny: They are constituent banks.

The Court: Prior to September, 1929?

Mr. McAneny: That is it.

A. They did.

Q. Which of those banks did they have deposits in? A. In 1929? 213

Q. Yes. A. I was not connected with the City in 1929, and therefore I do not know exactly what banks they had deposits in.

Q. When did these securities come into your possession? When you became Treasurer in 1932? A. Yes, when I assumed office in 1932 the list of securities was turned over to me by the outgoing treasurer.

Q. Were they turned over to you in bulk? Were they segregated in any sense? A. They were separated into envelopes, in envelopes like that one here (indicating), had all the lists of the First National Bank securities, and the

214 *Gustav W. Klein, Jr., for Defendants—Direct.*

other banks were designated in the same way. This is a list of the Yonkers National Bank and Trust Company and the Central National Bank.

Q. They were not segregated as being applicable to any particular fund? A. No.

The Court: How do you mean they were? They were then set apart in that way? You said some of them referred to one bank and some the other; some referred to the First National Bank and some the other bank.

215 Mr. McAneny: I am talking only of the securities of the First National Bank and Trust Company.

The Court: His answer was not that. There was some way of designating other banks there; his answer implies that.

The Witness: All the securities covering the one bank was kept in an envelope by themselves.

The Court: $535,000 was kept in one envelope by itself?

The Witness: This envelope here (indicating).

216 Q. That was kept in one parcel? A. Yes.

Q. Do you recall whether you have records showing what the amount of the securities was that was originally turned over to you? A. No, I have not got that list here.

Q. You do not know approximately? A. No, I could not say.

Q. What was your practice after you became City Treasurer with respect to deposits in the First National Bank and Trust Company? What did you do when you made a deposit and carried on that account? A. The practice was to see that whatever balance in the bank was—that the City of Yonkers had securities sufficient from the bank to cover those deposits.

Mr. Moore: I move to strike that out as not responsive, your Honor.

The Court: Is there any question that these are not covered by this deposit?

Mr. Romm: Later on it may develop that the pledge did not cover all of the accounts.

The Court: Counselor, you admitted that they did; $535,000 was sufficient to cover all of the deposits or it was not. Was the $535,000, as you contend, sufficient to cover all the deposits at that time?

Mr. McAneny: Yes. Yes, it was sufficient to cover 218
all deposits.

The Court: In this bank, I mean.

Mr. McAneny: As of March 3, 1933. Just a minute.

Q. Mr. Klein, you testified that $534,000 par value of these securities were returned by you to whom? To Mr. Trudeau? A. Mr. Trudeau.

Q. $534,000. You still have $1,000 that you are holding? A. Yes.

Q. When you returned those securities on the occasion of your returning them to Mr. Trudeau, what was your arrangement or understanding with him about the return of 219
those securities?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, what his understanding with Mr. Trudeau was, as a conclusion of the witness.

Q. What was said between you and Mr. Trudeau? A. As I recall the conversation, Mr. Trudeau said that when we released the securities he would release the money; as soon as we released the securities and as the balance in

220 *Gustav W. Klein, Jr., for Defendants—Cross.*

the bank dropped, to give him back so much security so that both accounts were practically equal at all times. As the money was released, we released the securities.

Q. As the City deposits were released, you mean? A. Yes.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. You were the Treasurer of this Police Pension Fund, were you, Mr. Klein? A. Yes.

221 Mr. McAneny: I cannot hear you.

Mr. Moore: I said "You were the Treasurer of this Police Fund then," and he said he was.

Q. Are you treasurer of it now, Mr. Klein? A. No.

Q. Who is the treasurer of it now? A. There is no treasurer. The Comptroller is the man that is designated now.

Q. You were acting for yourself and for the three trustees of the Police Pension Fund, weren't you?

Mr. McAneny: I object as calling for a conclusion and as not asking for any statement of fact.

222

Q. How many trustees were there of the Police Pension Fund?

Mr. McAneny: I object. That is covered by the law itself.

Mr. Moore: He knows.

The Court: I will let him answer.

A. Three.

Q. Who were they? A. The Mayor, the Commissioner of Public Safety and the Comptroller.

Q. When you were Treasurer you were treasurer of this fund? A. That is right.

Q. Once moneys got into this fund they were used for purposes of the police, were they?

Mr. McAneny: I object to that on the ground that the law covers the uses of this money.

Q. If you know?

Mr. McAneny: It was not used for the purposes of the police. The law specifically says that it is to be used for pensions, police pensions or police widows' pensions. 224

The Court: I will let him state so far as he has practical knowledge as to how these funds were applied.

Mr. McAneny: Exception.

Q. How were the funds applied? A. They were in payment of pensions to widows and those entitled to them.

Q. And the contributions which the City made were not returned to the City? A. No, they went into that fund.

Q. You say you kept those securities did you, Mr. Klein? A. I did. 225

Q. Where did you keep them? A. They were in a strong box in the safe of the City Treasurer's office.

Q. Did you have a safe deposit vault box No. 1988 in the First National Bank and Trust Company of the Yonkers Building? A. There was a safe deposit box down there. I could not tell the number right now.

Q. Did you keep the deposits there, I mean the securities there? A. The securities were kept in a safe deposit box in the bank building, that is right.

Q. They were not kept in the safe in the Comptroller's office? A. No. The lists of securities were kept there. No securities were ever kept in the Treasurer's office.

226 *Gustav W. Klein, Jr., for Defendants—Cross.*

Q. There was no written agreement between the bank and the City with reference to securities for deposits, was there? A. Not that I know of.

Q. You never saw one and never heard of one? A. No.

Q. Can you tell us in whose name this safe deposit box in the Yonkers National Bank and Trust Company was in which these securities were kept? A. As I recall, it was designated as the City of Yonkers, the paper that I signed every time I went to release securities or get some more.

Q. It was known as the Treasurer of the City of Yonkers and the First National Bank and Trust Company of
227 Yonkers? Wasn't the box in those two names? A. I cannot say that.

Q. Would you say it was not? A. No, I would not say it was not.

The Court: Is there anything further, Mr. McAneny?

Mr. McAneny: I would like to ask that in the Firemen's Pension Fund case that it be considered that the testimony of the witness with respect to his action pursuant to the order of the Board of Estimate and also the laws governing the Board of Es-
228 timate and the laws applicable thereto be included in that case, with leave that the case be reopened, inasmuch as there is no jury. I would like to request that it be conceded that this testimony be inserted in that case.

Mr. Romm: The resolution of the Board of Estimate of Apportionment?

Mr. Moore: I have the same objection as I had before, that it is irrelevant and incompetent and immaterial.

The Court: With that understanding, perhaps you better specify as to what is to be included and what your offer is. You say all that refers to certain testimony. You better be specific about it.

Mr. McAneny: I would like to include the resolution of the Board of Estimate and Apportionment and the sections of the law that were referred to, Section 69 and Section 70 of the Second Class Cities Law and the testimony to the effect that Mr. Roake was a member of the City Department and then in addition that he qualified in that case, along the same lines. I would like to offer in evidence in that case the claim in the Firemen's Pension Fund upon the check which has been offered in evidence here was paid; I would like the witness to identify it.

230

Mr. Moore: I object to all this upon the same ground that I objected to it in this Police Pension Fund case, on the ground it is incompetent, irrelevant and immaterial.

The Court: I understand you do not object to the reopening of the case for the purpose of offering this testimony?

Mr. Moore: No, I have no objection to that.

The Court: Subject to your right to raise the objection which you have raised in this case to the similar testimony, notwithstanding the fact that it is received, the objection is overruled and an exception noted.

231

(Witness excused.)

STEPHEN A. ROAKE, recalled, further testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Roake, in Plaintiff's Exhibit 4 it appears that there were two accounts carried under the Police Pension Fund, one apparently for $50 as of March 30, 1933 and the other for a larger amount; is that correct?

232 *Stephen A. Roake, Recalled—Direct.*

Mr. Romm: Will you read the question, please?

(Question read by the stenographer.)

Mr. McAneny: I withdraw that question.

Q. Can you explain why there are two?

The Court: Explain those two accounts.

Q. Can you explain those two accounts? A. The March 3rd?

233 Q. Yes, the March 3, 1933. A. The National Bank account, as we identify it, $29,233.67 and the $50 account carried in a separate account was an old Yonkers Trust Company account. At the time of the merger I asked the bank if they would keep these accounts separate for our identification because there were a number of outstanding checks on the old Yonkers Trust Company account, and they continued to carry that $50 item separately. It was out of the old Yonkers Trust Company account.

Q. They carried that on the books of the First National Bank and Trust Company? A. That is correct.

Q. Mr. Roake, have you a copy of the budget of the City of Yonkers for the year 1931 before you? A. I have.

234 Q. Will you turn to an item there under the caption of Police Pension Fund? A. Yes, sir.

Mr. Moore: May we have it marked for identification, Mr. McAneny?

Mr. McAneny: Do you object to a copy of the budget that I am producing?

Mr. Moore: I haven't seen it at all. I assume it is all right.

(Marked Defendants' Exhibit F for identification.)

Q. There is such an item there under that title? A. Yes, sir; in the 1931 estimate.

Q. That is the annual estimate of the City, isn't it? A. Yes.

Q. Can you state what that account is? A. Contributions to the Police Pension Fund, $27,625.02.

Q. Is that the estimated amount at the time? A. Yes.

Q. Will you look at the budget of the City of Yonkers for the year 1932? You have a copy of it before you? A. I have.

Q. Will you turn to the item in that budget under the 236
title of "Police P sion Fund"

Mr. McAneny: I ask to have this marked for identification.

(Marked Defendants' Exhibit G for identification.)

Q. Do you find such an item? A. I do.

Q. Will you state what that amount is? A. Contribution to the Police Pension Fund, $28,330.13.

Q. That is an estimated amount? A. That is an estimated amount, yes.

Q. That was all included in the annual budget of the 237
City of Yonkers? A. Yes.

Q. Budget for 1932? A. That is right.

Q. Have you also before you a copy of the budget of the City of Yonkers for the year 1933? A. I have.

Q. Does that include an item headed "Police Pension Fund"? A. It does.

Mr. McAneny: I would like to have this marked for identification.

(Marked Defendants' Exhibit H for identification.)

238 *Stephen A. Roake, Recalled—Direct.*

A: (Continuing) Contributions to Police Pension Fund for 1933, $28,527.36.

Q. Those figures are included in the annual estimate of the City, are they? A. Yes.

Q. That is an estimated amount? A. Right.

Mr. McAneny: I would like to offer in evidence Defendants' Exhibits F, G and H as being copies of the annual estimated budget of the City of Yonkers, and particularly with regard to the entry as to the Police Pension Fund.

239 Mr. Moore: I haven't any objection to the Police Pension Fund, but I have an objection to the introduction of these entire budgets into the case.

The Court: I assume you are introducing only that part of it which refers to the issue here on this pension fund.

Mr. McAneny: That is right.

Mr. Romm: That is in evidence without objection. There is no necessity to offer the papers in evidence.

The Court: He has testified to the facts.

Mr. McAneny: I will just offer it to the extent 240 of those entries.

Mr. Moore: All right.

The Court: Received with that limitation.

(Defendants' Exhibits F, G and H for identification received in evidence.)

The Court: Have you the pages there?

The Witness: Page 3 of Exhibit H; page 58 of Exhibit F; and page 2 of Exhibit G.

Mr. McAneny: That is all.

Cross examination by Mr. Moore:

Q. Mr. Roake, those were contributions made to the City to these funds, were they? A. Those were estimates of contributions to be made.

Q. Do the estimates and the actual amounts contributed there coincide? A. Very closely.

Q. Or agree as to amount? A. Very closely.

Q. That money once having been turned into either of those funds was never returned to the City, was it?

Mr. McAneny: Are you asking as a matter of fact or matter of law? 242

Mr. Moore: I am asking him whether he knows about it as a matter of fact. He has been there since 1922.

Mr. McAneny: You asked him if any money had been returned to the City by these funds or whether it should be returned by the City.

Q. I am asking you if when this money got into the Police or Firemen's Fund it became a part of that fund? A. It does.

Mr. McAneny: That is calling for a conclusion of the witness and is a matter of law. 243

The Court: I think that fact appears.

Mr. Moore: I do not think I will ask him any more. That is all.

Mr. McAneny: I ask that that question and answer be stricken out.

Mr. Moore: No, I think it should stand.

The Court: It may call for a conclusion if it does appear that these funds were deposited as contributions and depesited in a special fund. I think that is sufficient for the purpose.

Mr. McAneny: That is true.

The Court: I will strike it out; the motion is granted to strike out.

Mr. Moore: Exception.

Mr. McAneny: It is a question of law.

The Court: I understand that.

Mr. McAneny: That is all.

By Mr. Moore:

Q. Were those payments paid in the other years for the year 1933? You have given us two checks and those were similar payments made in the two previous years 1932 and 1931? A. Yes, sir.

Q. They were? A. Yes, sir.

Mr. Moore: That is all.

(Witness excused.)

Mr. Moore: The plaintiff rests; your Honor.

Mr. McAneny: The defendant rests.

Mr. McAneny: I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and valid

transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having no profit whatever in this situation, acting merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal. 248

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, *McNair, Receiver,* v. *W. D. Knott, Treasurer,* decided December 13, 1937 and not yet made public and published in the law books, covers this whole situation very clearly. 249

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

250 *Motion to Dismiss the Complaint.*

In the case cited of the *City of Mount Vernon* v. *The Mount Vernon Trust Company*, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

251 It is the same situation that might be urged in this case. In other words, the City had the securities and the bank paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through with without question and the bank paid these checks and got their collateral back, and that is what the Court of Appeals says they would have to do in
252 this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of *McNair* v. *Knott*, Judge McReynolds in determining the case with a concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity.

Mr. Moore: There was a question raised about the giving of notice this morning. You will notice that this action is not brought against the City of Yonkers. It is brought against the Trustees of the Firemen's Pension Fund of the City of Yonkers. There is no notice required, requiring us to give the City of Yonkers notice. No notice, I think, was given. I am not familiar with *McNair* v. *Knott*. I understand it is a recent case. The facts of it have never been brought to my attention. Mr. McAneny says it is not reported.

Mr. McAneny: It is reported, but not published in the printed volume.

The Court: The New York Court of Appeals?

Mr. McAneny: No, the Supreme Court.

Mr. Moore: I thought that we were going to submit briefs in this case, your Honor.

The Court: That is the way to do it, of course.

Mr. Moore: How long a time will you want?

The Court: What about the other suits?

Mr. Moore: I am prepared to go ahead with the next case.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes.

Plaintiff's Exhibit 1.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.
Acting Comptroller of the Currency.

(SEAL)

(Duly certified November 16, 1937.)

262

Plaintiff's Exhibit 2.

Proclamation.

(Seal of State)

State of New York

Executive Chamber

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of
263 the banking system of New York State. The spread of hysteria and the restrictions imposed upon the banking facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

264 I make this proclamation with complete conviction that the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

Now, therefore, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart

Plaintiff's Exhibit 2.

Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the (SEAL) City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State

268

Plaintiff's Exhibit 3.

Proclamation.

(SEAL OF STATE)

STATE OF NEW YORK

Executive Chamber.

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and
269 including March ninth, one thousand nine hundred thirty-three;

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of
(SEAL) the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord
270 one thousand nine hundred thirty-three.

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor.

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name ~~Police Pension Fund~~ City of Yonkers

Address c/o City Treasurer, City Hall, Yonkers, N. Y.

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
	Mar 2 '33	141.67—	125.00—					
	Mar 2 '33	141.67—	50.00—					
	Mar 2 '33	141.67—	50.00—					
	Mar 2 '33	125.00—	50.00—					
	Mar 2 '33	125.00—					Mar 2 '33	30,658.66*
30,658.66	Mar 2 '33	50.00—	50.00—					
	Mar 2 '33	166.67—					Mar 2 '33	30,391.99*
30,391.99	Mar 3 '33	50.00—	50.00—					
	Mar 3 '33	104.17—	87.50—					
	Mar 3 '33	87.50—	50.00—					
	Mar 3 '33	50.00—	50.00—					
	Mar 3 '33	141.67—	104.17—					
	Mar 3 '33	95.83—	50.00—					
	Mar 3 '33	50.00—					Mar 3 '33	29,421.15*
29,421.15	Mar 3 '33	50.00—	137.50—				Mar 3 '33	29,233.65*
29,233.65					Mar 3 '33	.02	Mar 3 '33	29,233.67*
29,233.67	Mar 10 '33	50.00—			Mar 10 '33		Mar 10 '33	29,183.67*
29,183.67	Mar 13 '33	50.00—					Mar 13 '33	29,133.67*
29,133.67	Mar 16 '33	166.67—	50.00—				Mar 16 '33	28,917.00*
28,917.00	Mar 17 '33	50.00—	50.00—					
	Mar 17 '33	50.00—					Mar 17 '33	28,767.00*
28,767.00	Mar 18 '33	50.00—	50.00—				Mar 18 '33	28,667.00*
28,667.00	Mar 20 '33	125.00—					Mar 20 '33	28,542.00*
28,542.00	Mar 20 '33	50.00—	58.33—					
	Mar 20 '33	50.00—					Mar 20 '33	28,383.61*
28,383.61	Mar 23 '33				Mar 20 '33		Mar 20 '33	28,383.67*
28,383.67	Mar 24 '33	50.00—	50.00—				Mar 24 '33	28,283.67*—
28,283.67	Mar 24 '33	137.50—					Mar 24 '33	28,146.17*—
28,146.17	Mar 24 '33	137.50—					Mar 29 '33	28,096.17*—
28,096.17	Mar 31 '33	166.67—	50.00—	50.00—			Mar 31 '33	27,829.50*—
27,829.50	Apr 1 '33	141.67—	104.17—	141.67—				
	Apr 1 '33	50.00—	87.50—	50.00—				
	Apr 1 '33	87.50—	125.00—	50.00—				
	Apr 1 '33	50.00—	87.50—	66.66—				
	Apr 1 '33	50.00—	95.83—	50.00—				
	Apr 1 '33	50.00—	166.67—	50.00—				
	Apr 1 '33	104.17—	68.75—	125.00—				
	Apr 1 '33	137.50—	50.00—	125.00—				
	Apr 1 '33	50.00—	50.00—	141.67—				
	Apr 1 '33	50.00—	125.00—	50.00—				
	Apr 1 '33	50.00—	50.00—				Apr 1 '33	25,148.24*—
25,148.24	Apr 3 '33	95.83—	50.00—	114.58—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	104.17—	104.17—	50.00—				
	Apr 3 '33	58.33—	50.00—	50.00—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	50.00—	50.00—	50.00—				
	Apr 3 '33	95.83—	50.00—	166.67—				
	Apr 3 '33	50.00—					Apr 3 '33	23,658.66*

Plaintiff's Exhibit 4.

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name Police Pension Fund City of Yonkers
Address c/o City Treasurer, City Hall, Yonkers, N. Y.

Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
58.66	Apr 4 '33	50.00—	119.79—	50.00—				
	Apr 4 '33	50.00—	50.00—	125.00—				
	Apr 4 '33	50.00—					Apr 4 '33	23,163.87
63.87	Apr 5 '33	95.83—	50.00—	110.41—				
	Apr 5 '33	141.67—	141.67—	95.83—				
	Apr 5 '33	50.00—	72.91—	50.00—			Apr 5 '33	22,355.55
355.55	Apr 6 '33	166.67—	50.00—	50.00—				
	Apr 6 '33	104.17—					Apr 6 '33	21,984.71
984.71	Apr 7 '33	87.50—					Apr 7 '33	21,897.21
897.21	Apr 8 '33	50.00—					Apr 8 '33	21,847.21
847.21	Apr 10 '33	95.83—	50.00—				Apr 10 '33	21,701.38
701.38	Apr 11 '33	125.00—	125.00—				Apr 11 '33	21,451.38
451.38	Apr 15 '33	50.00—					Apr 15 '33	21,401.38
401.38	Apr 17 '33	137.50—					Apr 17 '33	21,263.88
263.88	Apr 24 '33	141.67—					Apr 24 '33	21,122.21
122.21	Apr 29 '33	50.00—					Apr 29 '33	21,072.21
072.21	May 1 '33	50.00—	50.00—	50.00—				
	May 1 '33	50.00—	95.83—	50.00—				
	May 1 '33	50.00—	125.00—	141.67—				
	May 1 '33	50.00—	125.00—	125.00—				
	May 1 '33	125.00—	166.67—	119.79—				
	May 1 '33	104.17—	68.75—	50.00—				
	May 1 '33	50.00—	50.00—	141.67—				
	May 1 '33	87.50—	50.00—	50.00—				
	May 1 '33	66.66—	50.00—	50.00—				
	May 1 '33	87.50—					May 1 '33	18,792.00
792.00	May 2 '33	125.00—	58.33—	95.83—				
	May 2 '33	95.83—	50.00—	114.58—				
	May 2 '33	50.00—	50.00—	95.83—				
	May 2 '33	141.67—	87.50—	141.67—				
	May 2 '33	50.00—	50.00—				May 2 '33	17,585.76
585.76	May 3 '33	166.67—	50.00—	50.00—				
	May 3 '33	72.91—	104.17—	50.00—				
	May 3 '33	15,242.45—	50.00—	137.50—				
	May 3 '33	125.00—	95.83—	50.00—				
	May 3 '33	110.41—	141.67—	137.50—				
	May 3 '33	50.00—	104.17—	50.00—			May 3 '33	797.48
797.48	May 4 '33	50.00—	50.00—	50.00—				
	May 4 '33	50.00—	50.00—	50.00—			May 4 '33	497.48
497.48	May 5 '33	166.67—	50.00—				May 5 '33	280.81
280.81	May 6 '33	50.00—					May 6, 33	230.81
230.81	May 9 '33	50.00—					May 9 '33	180.81
180.81	May 10 '33	104.17—					May 10 '33	76.64
76.64	May 15 '33	50.00—					May 15 '33	26.64
26.64	Jul 26 '33	1.64—					Jul 26 '33	25.00
25.00	Oct 26 '33	25.00—					Oct 26 '33	.00

FIRST NATIONAL BANK AND TRUST COMPANY
YONKERS, N. Y.

Name City of Yonkers, Police Pension Fund

Old Balance	Date	Checks in Detail			Date	New Balance

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Plaintiff's Exhibit 5.

Description of Assets Pledged	Face Value
State of Arkansas, 4½s, due 1942	$ 50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4½s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1945	2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00

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280 *Defendants' Exhibit A*

Description of Assets Pledged	Face Value
Village of Sea Cliff, New York, 5s, due 1933	$ 1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
281 Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co., 5s, due 1950	10,000.00
Laclede Gas Light Co., 5½s, due 1935	5,000.00
Total Face Value	$535,000.00

Defendants' Exhibit A.

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(Same as Plaintiff's Exhibit 5.)

Defendants' Exhibit B.

(FRONT)

CITY OF YONKERS, N. Y.

Warrant No. 170736 No. 64270

Yonkers, N. Y., Feb. 28, 1933.

50-53 WESTCHESTER TRUST COMPANY

Pay to the
order of POLICE PENSION FUND—YONKERS.....$27,447.76
City of Yonkers $27447 and 76 Cts.....Dollars

This check is payable through any member of the New York Clearing House without charge for exchange.

for P. P. Fund

Countersigned by

JAS. E. HUSHION
Comptroller

G. W. KLEIN JR.
Treasurer

CITY TREASURER'S OFFICE

(BACK)

[Perforation]

PAID
3.1.33
[Stamps]

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed
[FEB 28 33]

THE FIRST NATIONAL BANK & TRUST CO.
50-51 Yonkers, N. Y. 50-51

William J. Bright, Cashier.
Pay to the Order of
FIRST NATIONAL BANK
Account of
Police Pension Fund
City of Yonkers.

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Defendants' Exhibit C.

Resolution of Board of Estimate and Apportionment of The City of Yonkers, adopted July 10, 1929.

By Mr. Davis:—

Resolved, That The First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the City Treas-
287 urer of the City of Yonkers; and the City Treasurer is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and one-
288 half per cent (3½%); Saunders Trade Fund, three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

289

Defendants' Exhibit D.

(Front)

The City of Yonkers, N. Y.

Department of Finance Bureau of Comptroller

To Police Pension Fund Dr.

Items	Amount
Police Pension Fund for year ended December 31, 1932	
Members' Contributions $18,298.51	290
City's Contribution (Local Law No. 1 (1931) Section 2) one and one-half (1½) times $18,298.51	$27,447.76
9,149.26	

To the Comptroller:

I hereby certify, That the merchandise, materials or articles enumerated in the above account have been received and the services specified performed; that the prices are reasonable and just; that they were necessary for, and have been, or will be, applied to the uses of this Department, *and I further certify that no part of said account amounting in the aggregate to $27,447.76 has been paid or satisfied and that said amount be charged to the appropriate account as indicated on the opposite side of this claim.* 291

Signed R. E. Marchand

Title of Office Deputy Comptroller

Yonkers, 1/4/33

292 *Defendants' Exhibit D.*

(BACK)

Warrant No. 176736

Claim No. 32307 Amount, $27,447.76

CLAIMANT

Police Pension Fund,
Address Yonkers, N. Y.

293

Account	Amount
Police Pension Fund	$27,447.76
1932	
Current Account	
Total	$27,447.76

Received for audit Jan 5 1933
Approved for payment 1/10/1933
Date of payment Feb 27 1933

MOREY
Auditor.

294

R. E. MARCHAND
Deputy Comptroller.

Defendants' Exhibit E.

Receipts for Bonds Surrendered.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s —1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

298 *Defendants' Exhibit E.*

April 3rd, 1933

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400
5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
299 1,000	" " "	4½	1954	18¼	812.50
					$124,812.50

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator.

FIRST NATIONAL BANK & TRUST CO.
Yonkers, N. Y.

April 7, 1933

300 Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

Defendants' Exhibit E. 301

May 4, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

5,000.	City of Charlotte, N. C. 4½s due 1934
12,000.	Galveston, Texas 5s—1933-5
15,000.	Town of Greenburgh, N. Y. 4½s—1946
2,000.	Town of Huntington, L. I. 4½s—1938
2,000.	" " " 4½s—1945
10,000.	City of New York 4½s—1965
2,500.	State of Oregon 5½s—1938
2,500.	" " 5½s—1945
2,500.	" " 5½s—1945
2,500.	" " 5½s—1946
1,000.	Village of Sea Cliff, N. Y. 5s—1933
25,000.	State of New Mexico 6s—1935
6,000.	Seattle, Wash., 5s—1934
2,000.	" " 5s—1940

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said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO. 303

PERCIVAL W. TRUDEAU, Conservator.

304 *Defendants' Exhibit E.*

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers,

305 PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

306 1,000 Oregon State Highway 5½% bond due Oct. 1, 1938; No. 5110 and

1,000 Oregon State Highway 5½% Bond due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU

FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU, Conservator.

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Defendants' Exhibit F.

Extract from Annual Budget, Yonkers, 1931.

Extract from Annual Budget, City of Yonkers.
Itemized Statement of Expenditures for 1931.

• • • •

26. Miscellaneous:
Contribution to Police Pension Fund, $27,625.02.

308

Defendants' Exhibit G.

Extract from Annual Budget, Yonkers, 1932.

Extract from Annual Budget, City of Yonkers.
Annual Estimate of 1932 Summary Statement.
Expenditures, Administration and Maintenance,

• • • •

26. Other Administrative Expenditures:
Contributions to Police Pension Fund, $28,330.13.

309

Defendants' Exhibit H.

Extract from Annual Budget, Yonkers, 1933.

Extract from Annual Budget, City of Yonkers.
Annual Estimate of 1933 Summary Statement.
Expenditures, Administration and Maintenance.

• • • •

28. Other Administrative Expenditures:
Contributions to Police Pension Fund, $28,527.36.

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Findings of Fact.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

311

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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This cause having duly come on to be tried by the Court without a Jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows:

1. The defendants constitute the Board of Trustees of the Police Pension Fund of the City of Yonkers and have the care, control and management of the fund.

2. On March 4, 1933 the defendants had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Police Pension Fund City of Yonkers" the sum of $29,233.67, and in a checking account captioned "City of Yonkers Police Pension Fund" the sum of $50.00. The bank has since September 30, 1929

been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

3. The sources of the Police Pension Fund, as fixed by statute and local law, are rewards, gifts, fines, salary deductions and contributions from the City of Yonkers.

4. The purposes of the fund are to pay pensions to retired department members or their next of kin and to pay premiums on group life insurance policies covering the 314
lives of department members.

5. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

6. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

7. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 315
and appointed a successor Conservator on July 24, 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the plaintiff was appointed successor to such Receiver on November 15, 1937.

8. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

9. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

10. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid accounts and for city deposits bonds having a par value of $535,000.

11. The balance of $29,283.67 in the accounts on March 4, 1933 was paid out in various amounts between March 10, 1933 and October 26, 1933.

12. Between March 29, 1933 and July 20, 1933 the City returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

13. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

14. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

15. No statute of the state of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

16. No statute of the state of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

17. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

18. Under the common law of the state of New York, as declared by its highest court, state banks lack the power

to pledge assets to secure deposits of political subdivisions of the state.

19. That the pledge of assets by the bank to secure the deposits in the accounts of the Police Pension Fund City of Yonkers and City of Yonkers Police Pension Fund was illegal and *ultra vires.*

20. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the Bank became fixed as of March 6, 1933.

21. That the payments to the defendants from the de- 320
posit accounts Police Pension Fund City of Yonkers and City of Yonkers Police Pension Fund were made with a view to the preference of the defendants over other creditors of the Bank.

22. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

23. That the payments from the Police Pension Fund City of Yonkers deposit account and City of Yonkers Police Pension Fund deposit account to the defendants were voluntarily made under a mistake of law but are nevertheless recoverable.

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24. Plaintiff is entitled to recover the sum of $14,641.84, being the difference between the amount which the defendants should have received under the 50% dividend paid by the Bank and the sum of $29,283.67 paid to the defendants, together with interest and the costs of this action.

25. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $17,570.20 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $14,641.84 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT
District Judge

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Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

323 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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Come now the above named defendants by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, their attorney, and considering the same to be material to the proper presentation of this case, respectfully request the Court to make and enter the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a

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National Banking Institution organized and existing under and by virtue of the laws of the United States of America, having its only place of business in the City of Yonkers, State of New York.

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the defendants, Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey are the Mayor, Comptroller and Commissioner of Public Safety of the City of Yonkers, New York, respectively, and have since the 1st day of January, 1932, constituted the Board of Trustees of the Police Pension Fund of the City of Yonkers, having the care, control and management of said fund.

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4. That previous laws of the State of New York and of the City of Yonkers in relation to the Police Pension Fund of the City of Yonkers were superseded and amended by Local Law number 1-1931 of the City of Yonkers, which provides as follows:

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"CITY OF YONKERS

LOCAL LAW No. 1—(1931)

A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XI POLICE PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS AMENDED, ENTITLED 'AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO.'"

328 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

Be it enacted by the Common Council of the City Yonkers, as follows:—

Section 1. Article XI, Police Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended, entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded
329 to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Police Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof. All orders made payable from the said fund shall be made upon the vote of said trustees, and such orders must be signed by the Commissioner of Public Safety, and countersigned by the Comptroller and by the City Treas-
330 urer. The trustees of the said fund shall invest for the benefit of the fund all moneys not necessary for the payment of pension, as hereinafter provided. Such investment shall be made only in securities in which the savings banks of the State of New York are authorized by law to invest. In addition to and as part of the pensions hereinafter specified, the said trustees are directed to cause group life insurance policies in sum of One Thousand Dollars per member to be issued upon the life of such member while employed in such service and until retirement there-

from and to pay out of said fund the premiums due thereon, provided the beneficiary named in said policies shall be limited to the widow, minor children under 18 years of age, or next of kin, of such member. The trustees of the said fund shall report in detail to the Common Council annually in the month of January, the condition and the disposition of the fund, and the items of receipts and disbursements for account of the same during the year ending on the thirty-first day of the December preceding, including insurance policies then outstanding. 332

Section 2. The police pension fund as it now exists is continued; and in addition to the moneys and investments therein contained it shall consist of:

1. All fines imposed by the Commissioner of Public Safety on the members of the Police Department in the City of Yonkers.

2. All rewards, money, gifts, testimonials and emoluments that may be paid or given to any member of the Police Department, for account of police service, except such payments or gifts as have been or shall be allowed by the Commissioner of Public Safety to be retained by the members receiving the same. 333

3. All money, pay, compensation or salary or any part thereof deducted or withheld from any member or members of the Police Department, for or on account of absence or suspension from duty except in cases of sickness.

4. All lost or stolen money remaining in the hands of the police for the period of one year and for which there shall be no lawful claimant; and the

moneys arising from the sale of unclaimed property, which property the Commissioner of Public Safety is hereby authorized to sell, after it shall have been without a lawful claimant for the period of one year.

5. All fees received and paid for the inspection and testing by the police of combustibles and dangerous material, as shall be provided by the laws and ordinances of the City.

335 6. All moneys which shall be deducted from the monthly pay, salary or compensation of each member of said department and which shall be the sum of two per centum of the monthly pay, salary or compensation of each of the said members; which said sum shall be deducted monthly by the Comptroller of the City of Yonkers from the pay, salary or compensation of each and every member of said Police Department. And the Comptroller is hereby authorized, empowered and directed to deduct the said two per centum of the monthly pay, salary or compensation as aforesaid, and to cause the same to be paid forthwith to the trustees of the said Police Pension
336 Fund.

7. An amount payable to the trustees of the Police Pension Fund out of the City treasury at the end of each fiscal year equivalent to one and one-half times the amount of moneys deducted from the monthly pay, salary, or compensation of each member of said Police Department during such year, as provided by subdivision six of this section.

Whenever, in any calendar year the disbursements from said fund shall exceed the total income thereof, and the principal sum of said fund is less than $450,000.00 there shall be included in the next annual

budget and levy a sum to equal the amount of such deficiency for such previous year, and same paid to the trustees of said fund.

Section 3. RETIREMENTS. The Commissioner of Public Safety shall have the power and authority to retire from all service in the Police Department and relieve and dismiss from the said Department any member or officer of the Department who, upon an examination by the Police Surgeon ordered by the said Commissioner, is found to be disqualified physi- 338
cally or mentally in the performance of his duties.

The Commissioner of Public Safety shall retire from all service in the Police Department and relieve and dismiss from the said department, members or officers thereof in the following cases:

(a) Notwithstanding the provisions of Section 136, Second Class Cities Law, Chapter 55, Laws of 1909, as amended, the Commissioner of Public Safety is hereby directed to retire from all service in the Police Department, any member or officer attaining the age of sixty-four years and it is the pur- 339
pose of this provision to retire the said member by operation of law and not by the exercise of any discretion on the part of the Commissioner of Public Safety. The record of the Department of Public Safety as to the age of the various members and officers supplied to the said Department at the time of the appointment of the said member shall be controlling as to his age.

(b) Any member or officer of the Department, regardless of the age of the said member, who shall have served continuously as a member or officer of the Department for a period of twenty-five years at

the time of his application for retirement, provided that such member or officer applies for retirement. Nothing in this section contained shall, however, be construed as a limitation on the powers otherwise conferred by law with respect to the removal or dismissal of members or officers of the Police Department. No refunds for salary deductions shall be made to members dismissed from said force, or to any member who resigns before being entitled to a pension hereunder.

Section 4. The said board of trustees shall grant pensions out of said pension fund, in the following cases:

1. To any member or officer of the Police Department who shall have been retired for disability and who has been relieved and dismissed from the Police Department and who has been placed on the pension roll, as provided in section three of this article, an annual pension payable monthly during his lifetime of a sum of money amounting to one-half of the full salary or compensation received by such member or officer at the date of his retirement from service; and said pension or allowance so allowed is to be in lieu of any salary which such member or officer was entitled to receive at the date of his being so relieved or retired from duty and the City shall not be held liable for any payment of any claim or demand for service thereafter rendered by the member or officer of the force so retired.

2. To the widow of any member of the police force who shall have been killed while in the actual performance of police duty, or who shall have died from the effects of any injuries received in the actual

discharge of such duty one half of the annual salary of such member at time of death, payable to said widow during her lifetime, unless she remarries when said pension is to terminate.

To the widow of any such member, who has died, or shall hereafter die after three months of service on said police force, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate as to each child. If there be no widow or child or children under the said age of eighteen years, then the said sum of $600.00 shall be paid to the next of kin of such deceased member, said sum to be paid thereafter to such next of kin for one half the number of years of service to the credit of such deceased member.

To the widow of such member, who shall have been retired on a pension, or who shall hereafter be retired on a pension, a sum not exceeding six hundred dollars per year, during widowhood. If there be no widow then the said sum of $600.00 shall be paid to the child or children of such member until such child or children arrives at the age of eighteen years, when such pension is to terminate, as to each child. If there be no widow or child or children under said age of eighteen years, then said sum of $600.00 shall be paid to dependent parent, for one half the number of years of service to the credit of such deceased member.

3. Pensions to widows shall terminate when the widow shall remarry, and pensions to children shall

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terminate whenever the children shall respectively arrive at the age of eighteen years.

No pension shall be paid except from the Police Pension Fund, nor shall a pension be paid to any other than members of the said department whose salaries shall or shall have contributed to the maintenance of the Police Pension Fund or their relatives as specified in the preceding section, nor shall a pension be awarded or granted on account of physical
347 or mental disability or disease where the disability or disease is caused by the culpable negligence or misconduct of the disabled or diseased party.

4. The said trustees are authorized to increase existing $300.00 pension to widows and children under eighteen years of age of deceased members to a sum not exceeding $600.00 to take effect from the time of granting such increase to such widow or children.

5. Every person who knowingly or wilfully in anywise procures the making or presentation of any
348 false or fraudulent affidavit or affirmation concerning any claim for pension or payment thereof, shall be in every such case forfeit a sum not exceeding two hundred and fifty dollars to be sued and recovered by and in the name of said trustee of said Police Pension Fund and when recovered paid over to and thereupon become a part of said Police Pension Fund.

6. For the purpose of this act the board of trustees of said Police Pension Fund is hereby authorized to administer oaths and take acknowledgements;

and any person who shall wilfully swear falsely in any oath or affirmation in obtaining or procuring any pension under the provisions of this act shall be guilty of perjury. The Comptroller is authorized to require sworn proof of beneficiary's identity before delivery of any pension check hereunder.

7. Moneys, securities and effects of said Police Pension Fund and all pensions granted and payable from said fund shall be and are hereby exempt from execution and from all process and proceedings to 350
enjoin and recover the same by or on behalf of any creditor or pension having or assisting any claim against or debt or liability of any pensioner of said fund.

8. The members of said Police Department whose salaries contribute to said pension fund shall annually select two of their members and the pensioners shall annually select one of their members; and the persons so selected shall constitute an auditing committee and shall audit the accounts and proceedings of the said trustees and make and file with the Clerk of the City of Yonkers a written report. 351

Section 5. In case any part of this act is declared invalid the remaining part shall continue in full force and virtue.

Section 6. Article XI, Police Pension Fund incorporated in Supplemental Charter as part of Chapter 452, Laws of 1908, is hereby superseded.

Section 7. This Local Law shall take effect as prescribed by the City Home Rule Law.

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Adopted by the Common Council at a stated meeting held November 10th, 1931, by a vote of ten to one.

JOHN S. DAVIS
President of the Common Council.

Attest:

JOHN S. KETTELL
City Clerk

353 Approved November 23, 1931.

JOHN J. FOGARTY
Mayor.

5. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

354 6. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929, from time to time prior thereto to secure, among other deposits, deposits of the defendants made by said City Treasurer, in the accounts, to wit: "Police Pension Fund, City of Yonkers", $29,233.67; and "City of Yonkers, Police Pension Fund", $50.

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7. That on March 4, 1933, the defendants had on deposit in The First National Bank and Trust Company of Yonkers moneys in the accounts and sums as follows: "Police Pension Fund, City of Yonkers," $29,233.67; and "City of Yonkers, Police Pension Fund", $50.

8. That the moneys on deposit in The First National Bank and Trust Company of Yonkers in the accounts "Police Pension Fund, City of Yonkers" in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50, were public funds. 356

9. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a banking holiday.

10. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

11. That The First National Bank and Trust Company was solvent on March 4, 1933.

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12. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

13. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

14. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

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15. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 6, 1933, until further proclamation by the President.

16. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

17. That The First National Bank and Trust Company
359 of Yonkers was solvent on March 9, 1933.

18. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

20. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was
360 under the management and control of its own officers.

21. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

Defendants' Requests for Findings of Fact and Conclusions of Law.

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23. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers paid out of the funds deposited prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers" the sum of $850 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 10, 1933	$ 50.00
March 13, 1933	50.00
March 16, 1933	216.67
March 17, 1933	150.00
March 18, 1933	100.00
March 20, 1933	283.33

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24. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants' not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

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25. That from March 21, 1933, to March 28, 1933, The First National Bank and Trust Company of Yonkers by and with the consent of Percival W. Trudeau, Conservator, paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers" the sum of $237.50 upon pension checks issued by the defendants and signed by the Comptroller and by

the Treasurer of the City of Yonkers, such payments having been made on March 24, 1933.

26. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendants' deposits, of the par value of $197,000.

27. That on July 24, 1933, Louis B. Rossire was appointed successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

28. That from March 29, 1933, to January 23, 1934, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, and Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Police Pension Fund, City of Yonkers", the sum of $28,146.17 upon pension checks issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers, such payments having been made in the following amounts on the following dates, respectively:

March 29, 1933	$ 50.00
March 30, 1933	266.67
April 1, 1933	2,681.26

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April	3, 1933	1,489.58
April	4, 1933	494.79
April	5, 1933	808.32
April	6, 1933	370.84
April	7, 1933	87.50
April	8, 1933	50.00
April	10, 1933	145.83
April	11, 1933	250.00
April	15, 1933	50.00
April	17, 1933	137.50
April	24, 1933	141.67
April	29, 1933	50.00
May	1, 1933	2,280.21
May	2, 1933	1,206.24
May	3, 1933	16,788.28
May	4, 1933	300.00
May	5, 1933	216.67
May	6, 1933	50.00
May	9, 1933	50.00
May	10, 1933	104.17
May	15, 1933	50.00
July	26, 1933	1.64
October	26, 1933	25.00

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except that one check dated May 2, 1933, in the sum of $15,242.45 was not a pension check but represented the balance of the account on that date which was withdrawn and deposited in a new Police Pension Fund account in the Yonkers National Bank and Trust Company.

29. That the moneys paid out of the account "Police Pension Fund, City of Yonkers" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

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30. That on October 26, 1933, The First National Bank and Trust Company of Yonkers, by and with the consent of Louis B. Rossire, successor Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "City of Yonkers, Police Pension Fund" the sum of $50.00 upon a pension check issued by the defendants and signed by the Comptroller and by the Treasurer of the City of Yonkers.

371 31. That the moneys paid out of the account "City of Yonkers, Police Pension Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

32. That between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendants, the City of Yonkers, in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants deposits, of the par value of $337,000 on the dates and in
372 the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

33. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave

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receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers".

34. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers. 374

35. That the defendants were secured depositors to the extent of deposits in the account "Police Pension Fund, City of Yonkers" in the sum of $29,233.67.

36. That the defendants were secured depositors to the extent of deposits in the account "City of Yonkers, Police Pension Fund" in the sum of $50.

37. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits. 375

38. That no claim was ever filed with the City of Yonkers, or any officer thereof, for the claim alleged in the complaint herein.

39. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers, or any officer thereof, with respect to the claim alleged in the complaint herein.

40. That The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

41. That all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendants out of the accounts "Police Pension Fund, City of Yonkers" and "City of Yonkers, Police Pension Fund" were paid while said bank was solvent.

42. That no demand was ever made upon the defendants, the City of Yonkers, its officers or employees for the return of any of the money sued for herein.

43. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

44. That all acts found to have been done herein by the City of Yonkers were done by it on behalf of and as agent for the defendants.

CONCLUSIONS OF LAW.

1. That the defendants are entitled to judgment dismissing the complaint with costs.

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York as amended.

3. That the funds deposited by the defendants in the First National Bank and Trust Company of Yonkers in accounts, "Police Pension Fund, City of Yonkers", in the

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sum of $29,233.67, and "City of Yonkers, Police Pension Fund", in the sum of $50.00 were public funds.

4. That the Proclamation of the Governor of New York of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

5. That the Proclamation of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

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6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

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8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

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11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

12. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

13. That the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and
383 Trust Company of Yonkers prior to its insolvency.

14. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

15. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

16. That the plaintiff has failed to prove a cause of
384 action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

17. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

18. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

Defendants' Requests for Findings of Fact and Conclusions of Law.

19. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

20. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

21. That the negotiation of a settlement of claims against the First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

22. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants was based upon a good and valid consideration.

23. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants constituted an accord and satisfaction.

24. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

25. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

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26. That the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants is determined by the laws of New York, the place of making.

27. That the defendants were entitled to a preference in the payment of their funds upon liquidation of The First National Bank and Trust Company of Yonkers.

389 28. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions hereof, in such banks.

29. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendants.

30. That The First National Bank and Trust Company
390 of Yonkers' depositing assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

31. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the accounts, "Police Pension Fund, City of Yonkers", in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50.00 was lawful.

32. That the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

Defendants' Requests for Findings of Fact and Conclusions of Law.

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33. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

34. That in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to defendants.

392

35. That the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

36. That the payment of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

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37. That the payment of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "permitted"

394 *Defendants' Requests for Findings of Fact and Conclusions of Law.*

payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

38. That the defendants were creditors of The First National Bank and Trust Company of Yonkers.

39. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as
395 security for the indebtedness.

40. That the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendants.

41. That this action was not commenced within the time limited by law.

42. That the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

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43. That the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

44. That the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to

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have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

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In the event of a denial by the Court of defendants' requests for the foregoing findings of fact and conclusions of law or any part thereof, defendants respectfully request the Court to grant an exception or exceptions to defendants.

Dated: Yonkers, N. Y., July , 1938.

Respectfully submitted,

399

LEONARD G. MCANENY,
Attorney for Defendants.

400

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

401

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

402

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel; for Defendant.

KNIGHT, District Judge:

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law. 403

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found, except as to section 3 *et seq.*
5. Found.
6. Found.
7. Found.
8. Refused.
9. Found. 404
10. Found.
11. Refused.
12. Found.
13. Refused.
14. Refused.
15. Found.
16. Refused.
17. Refused.
18. Found.
19. Refused.
20. Refused.
21. Refused. 405
22. Refused.
23. Found if amended to show that payment of March 20, 1933, was by the Conservator.
24. Refused.
25. Found.
26. Refused.
27. Found.
28. Found, except amended to show payment as of March 30, 1933, was as of March 31, 1933.
29. Refused.
30. Found.

406 *Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.*

31. Refused.
32. Refused.
33. Found.
34. Found.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Found.
40. Refused.
407 41. Refused.
42. Found.
43. Refused.
44. Refused.

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
408 6. Found.
7. Refused.
8. Refused.
9. Refused.
10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Refused.
16. Refused.
17. Found
18. Found.

Memorandum of Court on Defendants' Requests for Findings of Fact and Conclusions of Law.

19. Found.
20. Found.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused.
33. Refused.
34. Refused.
35. Refused.
36. Refused.
37. Refused.
38. Found.
39. Refused.
40. Refused.
41. Refused.
42. Refused.
43. Refused.
44. Refused.

July 18, 1938.

JOHN KNIGHT
United States District Judge

Filed July 29, 1938

412 **Defendants' Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

413 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

414 Exceptions are allowed the defendants as noted in the stenographic minutes of the trial herein, and to the findings numbered 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 contained in the findings of the court, dated July 18, 1938, and to the denial of findings of fact numbered 4, 8, 11, 13, 14, 16; 17, 19, 20, 21, 22, 23, 24, 26, 28, 29, 31, 32, 35, 36, 37, 40, 41, 43 and 44 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43 and 44, as requested by the defendants, this 27th day of October, 1938.

JOHN KNIGHT
U. S. D. J.

And the defendants pray that their bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

Dated, Yonkers, New York, November 17, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Attorney for Defendants.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial, and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial.

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

418

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

419

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y.; MORRIS L. ROSENWASSER, and HAROLD T. GARRITY, of Counsel for Defendants.

Hon. JOHN KNIGHT, District Judge:

On March 4, 1933, the defendants, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, had on deposit with the First National Bank and Trust Company (hereinafter referred to as the bank) in a checking account nominated: "Police Pension Fund, City

of Yonkers" the sum of $29,283.67, and in a checking account nominated: "City of Yonkers, Police Pension Fund" the sum of $50.00. This money was deposited with the bank in accordance with a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, designating the First National Bank and Trust Company as one of the depositaries for the "purpose of depositing all moneys of the city received by the City Treasurer of the City of Yonkers." The City of Yonkers then held various bonds deposited by the bank as security for the above mentioned and other deposits. All of the aforesaid deposits were withdrawn by a series of checks beginning March 10, 1933, and ending October 26, 1933, inclusive. Thereafter the bonds pledged to secure said deposits were returned to the bank.

In *Downey* v. *City of Yonkers*, this day decided by me, I have held that the pledge of assets to secure public funds is illegal and *ultra vires*. It is defendants' contention herein that the Police Pension Fund of the City of Yonkers is a public fund. It is not necessary to decide whether it is or is not. The pledge of assets to secure either public or private funds is *ultra vires*. *City of Marion* v. *Sneeden*, 291 U. S. 262; *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245 (rehearing denied 292 U. S. 600).

For the reasons given in *Downey* v. *City of Yonkers*, *supra*, the pledge of the securities for this deposit was *ultra vires*.

The plaintiff is entitled to recover the sum of $14,641.81 being the difference between the amount which the plaintiff should have received as a fifty per cent. dividend from the bank and the amount paid by the bank to the city on account of the two deposits aforesaid, with interest from April, 1936. Findings of Fact and Conclusions of Law may be submitted; to be signed and made a part of this opinion. June 8, 1938.

JOHN KNIGHT,
United States District Judge.

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Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

425

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

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The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 4th and 5th days of January, 1938, without a jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendants having appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $72.85.

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Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, the sum of
428 $14,641.84 together with interest thereon in the sum of $2,255.73 and the sum of $72.85 costs as taxed, making in all the sum of $16,970.42 and that the plaintiff have execution therefor against the defendants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers.

Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

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Opinion of Court on Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

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Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

HON. JOHN KNIGHT,
District Judge.

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WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

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The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating the necessity for exception and Rule 73 eliminating the necessity of assignments of error, and said motion having

Order Denying Motion to Apply New Rules on Appeal. 433

been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel,

Now, on reading and filing the notice of motion dated the 20th day of September, 1938 and the affidavit of Leonard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is

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ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

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Petition and Order Allowing Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER E. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

437

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

438

To the Honorable William Bondy, Judge of the District Court, sitting for the Southern District of New York:

Now, come the defendants-appellants, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, by Leonard G. McAneny, their attorney, and feeling themselves aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby pray that an appeal may be allowed

to them from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioners herewith present their assignment of errors.

Petitioners further pray that an order be made fixing the amount of the bond to be given by defendants for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

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Dated: Yonkers, New York, October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney for
Defendants-Appellants.

The above appeal is hereby allowed.

Dated: New York, N. Y., October 31st, 1938.

WM. BONDY,
U. S. D. J. 441

A bond for costs in the usual form was duly approved and filed in the office of the Clerk of the Court on October 31, 1938.

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Assignments of Error and Prayer for Reversal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

443

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

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NOW COME the defendants-appellants Joseph F. Loehr, Mayor; James J. Hushion, Comptroller; and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, by Leonard G. McAneny, Corporation Counsel, their attorney, and submit, present and file their assignment of errors complained of and say:

That in the records and proceedings of the Hon. United States District Court for the Southern District of New York in a certain action entitled "Walter F. Downey, Receiver

of The First National Bank and Trust Company of Yonkers, in liquidation, Plaintiff v. Joseph Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Defendants", and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

1. The said Court erred in finding that the bank did not open for business on March 4, 1933 and never afterwards reopened for regular business. 446

2. The said Court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said Court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

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4. The said Court erred in finding that no applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

5. The said Court erred in finding that under the common law of the State of New York as declared by its highest court, state banks lack the power to pledge assets to secure deposits of political subdivisions of the state.

6. The said Court erred in finding that the pledge of assets by the bank to secure the deposits in the accounts

448. *Assignments of Error and Prayer for Reversal.*

of the "Police Pension Fund, City of Yonkers", and "City of Yonkers, Police Pension Fund", was illegal and *ultra vires.*

7. The said Court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the bank became fixed as of March 6, 1933.

8. The said Court erred in finding that the payments to the defendants from the deposit accounts, "Police Pen-
449 sion Fund, City of Yonkers", and "City of Yonkers, Police Pension Fund", were made with a view to the preference of the defendants over other creditors of the bank.

9. The said Court erred in finding that no service of any notice of claim or of intention to sue by the bank through its receiver was required.

10. The said Court erred in finding that the payments from the Police Pension Fund, City of Yonkers, deposit account, and City of Yonkers, Police Pension Fund, deposit account, to the defendants, were voluntarily made under a
450 mistake of law but are nevertheless recoverable.

11. The said Court erred in finding that plaintiff is entitled to recover the sum of $14,641.84, being the difference between the amount which the defendants should have received under the 50% dividend paid by the bank and the sum of $29,283.67 paid to the defendants, together with interest and the costs of this action.

12. The said Court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $17,570.20 from May 1, 1936 to November 2, 1937, and interest at the same rate on the sum of $14,641.84

from November 3, 1937 to the date of the judgment to be entered herein.

13. The said Court erred in failing to find that Local Law number 1—1931 of the City of Yonkers, contained all the provisions set forth in paragraph numbered "4" in Defendants' Requests for Findings of Fact and Conclusions of Law.

14. The said Court erred in failing to find that the moneys on deposit in The First National Bank and Trust Company of Yonkers in the accounts "Police Pension Fund, City of Yonkers" in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50, were public funds. 452

15. The said Court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

16. The said Court erred in failing to find that the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent. 453

17. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

18. The said Court erred in failing to find that the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

454 *Assignments of Error and Prayer for Reversal.*

20. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

21. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

22. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank
455 and Trust Company was permitted to transact such business as any other bank was permitted to transact under the Presidential Proclamations of March 6, and 9, 1933.

23. The said Court erred in failing to find that from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers had the right to make payments on account of pension checks drawn against funds deposited prior to March 4, 1933.

24. The said Court erred in failing to find that on March 28, 1933, Percival W. Trudeau, in consideration (1)
456 of the defendants' releasing their lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendants not foreclosing their said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendants that he would pay out the funds of the defendants remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out.

25. The said Court erred in failing to find that on March 28, 1933, pursuant to the said agreement between

Percival W. Trudeau and the defendants, the City of Yonkers in consideration of said agreement and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendants' deposits, of the par value of $197,000.

26. The said Court erred in failing to find that the moneys paid out of the account "Police Pension Fund, City of Yonkers" by The First National Bank and Trust 458
Company of Yonkers were payments made in the regular course of business of such bank.

27. The said Court erred in failing to find that the moneys paid out of the account "City of Yonkers, Police Pension Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

28. The said Court erred in failing to find that between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Pervical W. Trudeau and the defendants, the City of Yonkers, in consideration of said agree- 459
ment and in reliance thereon, surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendants' deposits, of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers.

29. The said Court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "Police Pension Fund, City of Yonkers" in the sum of $29,233.67.

30. The said Court erred in failing to find that the defendants were secured depositors to the extent of deposits in the account "City of Yonkers, Police Pension
461 Fund" in the sum of $50.

31. The said Court erred in failing to find that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for their deposits.

32. The said Court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

462 33. The said Court erred in failing to find that all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendants out of the accounts "Police Pension Fund, City of Yonkers" and "City of Yonkers, Police Pension Fund" were paid while said bank was solvent.

34. The said Court erred in failing to find that the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

35. The said Court erred in failing to find that all acts found to have been done herein by the City of Yonkers were done by it on behalf of and as agent for the defendants.

36. The said Court erred in failing to make the conclusion of law that the defendants are entitled to judgment dismissing the complaint with costs.

37. The said Court erred in failing to make the conclusion of law that the funds deposited by the defendants in The First National Bank and Trust Company of Yonkers in accounts, "Police Pension Fund, City of Yonkers", 464
in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund", in the sum of $50.00 were public funds.

38. The said Court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

39. The said Court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and 465
Trust Company of Yonkers did not create a presumption that said bank was insolvent.

40. The said Court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

41. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

466 *Assignments of Error and Prayer for Reversal.*

42. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to March 20, 1933.

43. The said Court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

467

44. The said Court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover deposits of the defendants paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

45. The said Court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

46. The said Court erred in failing to make the conclu-
468 sion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to March 20, 1933.

47. The said Court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendants prior to January 23, 1934.

48. The said Court erred in failing to make the conclusion of law that the negotiation of a settlement of claims

against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

49. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, was based upon a good and valid consideration. 470

50. The said Court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, constituted an accord and satisfaction.

51. The said Court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency. 471

52. The said Court erred in failing to make the conclusion of law that National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

53. The said Court erred in failing to make the conclusion of law that the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendants, is determined by the laws of New York, the place of making.

472 *Assignments of Error and Prayer for Reversal.*

54. The said Court erred in failing to make the conclusion of law that under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

55. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safe-
473 keeping and prompt payment of public funds deposited with it by the defendants.

56. The said Court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers deposit of assets with the City of Yonkers as security for the defendants' deposits of public funds was lawful.

57. The said Court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendants in the accounts,
474 "Police Pension Fund, City of Yonkers", in the sum of $29,233.67, and "City of Yonkers, Police Pension Fund" in the sum of $50.00 was lawful.

58. The said Court erred in failing to make the conclusion of law that the defendants were secured depositors of The First National Bank and Trust Company of Yonkers.

59. The said Court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all

of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of the State of New York.

60. The said Court erred in failing to make the conclusion of law that in order to repossess itself of the assets, given to secure the deposits of the defendants, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to defendants.

61. The said Court erred in failing to make the conclusion of law that the payments of deposits between March 4, 1933, and March 20, 1933, to the defendants by The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

62. The said Court erred in failing to make the conclusion of law that the payment of deposits between March 20, 1933, and March 28, 1933, to the defendants by the Conservator of The First National Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

63. The said Court erred in failing to make the conclusion of law that the payment of deposits between March 28, 1933, and January 23, 1934, to the defendants by the Conservator and successor Conservator of The First National Bank and Trust Company of Yonkers were "per-

478 *Assignments of Error and Prayer for Reversal.*

mitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

64. The said Court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

479 65. The said Court erred in failing to make the conclusion of law that the defendants had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendants.

66. The said Court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

67. The said Court erred in failing to make the conclusion of law that the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

480 68. The said Court erred in failing to make the conclusion of law that the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

69. The said Court erred in failing to make the conclusion of law that the City of Yonkers is not liable in a civil action for damages or injuries to person or property,

or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or an account of which the claim arose, be presented to the common council and served upon the 482
Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

70. The said Court erred in denying the defendants' motion to dismiss the complaint made at the end of the plaintiff's case.

71. The said Court erred in sustaining the objection by the plaintiff to the following: 483

> "Q. And as City Treasurer, what were your duties? A. The duties were to see, of course, that the tax collections and the money received by the City from various departments were properly placed in the bank and checks had to be countersigned by the Treasurer and then the Comptroller's general supervision of the office of the City Treasurer; and also to see when money was deposited in the bank that the bank properly secured, or we got security from the banks in which these deposits were placed.

484 *Assignments of Error and Prayer for Reversal.*

Mr. Moore: I object to that and move that the last part of the answer be stricken out.

The Court: What was the question?

(Record read by the stenographer.)

The Court: It may go out. I suppose his duties were fixed by statute.

Mr. McAneny: I take an exception.

The Court: Stricken out, and exception to the defendants."

485 72. The said Court erred in denying the defendants' motion to dismiss the complaint made at the conclusion of the whole case.

WHEREFORE, said defendants-appellants respectfully pray:

1. That the judgment entered in said action be reversed.

2. That judgment be entered in favor of the defendants with costs in all courts.

3. That the Lower Court be directed to enter judgment in favor of the defendants with costs in all courts.

486

4. That said defendants-appellants have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel Attorney for
Defendants-Appellants.

487

Citation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

488

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

489

To Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, Appellee, and Benjamin W. Moore, his attorney:

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, South-

490 *Citation.*

ern District of New York, at New York, N. Y., wherein Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Denis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers are appellants and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, in liquidation is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not
491 be done to the parties in that behalf.

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

WILLIAM BONDY,
U. S. D. J.

492

493

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

494

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

495

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

Notice is hereby given that Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Denis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, defendants above named, hereby appeal to the Circuit Court of Appeals for the Sec-

496 *Stipulation and Order Extending Time to File Record.*

ond Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y.
October [illegible], 1938.

LEONARD G. MCANENY,
Corporation Counsel, Attorney
for Defendants,
Office & P. O. Address,
City Hall,
Yonkers, New York.

497

Stipulation and Order Extending Time to File Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

498 Plaintiff,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

WHEREAS, an appeal was allowed the defendants herein on the 31st day of October, 1938, and

Stipulation and Order Extending Time to File Record. 499

WHEREAS, the time of the said defendnats to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendants to docket this case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either 500
party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

On reading and filing the foregoing stipulation, it is 501

ORDERED, that the time of the defendants to docket the above entitled case and file the transcrpit of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

CHARLES WEISER,
Clerk, U. S. District Court,
Southern District of New York.

502 **Stipulation and Order Settling Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

503 *against*

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing
504 is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendants.

Stipulation and Order Settling Record. 505

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL
U. S. D. J.

506

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508

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,

Plaintiff,

509

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller; and DENIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants.

L. 63-189.

510

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(SEAL)

511

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS,
Defendant-Appellant.
No. 230.

512

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 231.

513

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,
Defendants-Appellants.
No. 232.

514 *Opinion.*

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

515 Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid
516 out by the Bank between March 8, 1933 and January 23, 1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

Opinion. 517

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 518
1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York.

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
(3) Nepperhan Sewer Fund of City of Yonkers	621.88

519

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933, the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

520 ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

521 By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows:

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04

522

2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84

3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

523

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit*, 292 U. S. 559; *McNair* v. *Knott*, 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or public deposits, *Texas & Pac.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

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> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

525

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization. *Lewis* v. *Fidelity Co.*, 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930 may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by
527 national banks it does not apply here.

But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to
528 give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, that, unless the right to pledge is expressly granted by a 530
federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. • • • This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor 531
part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges
533 and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a depositor until he is paid in full is directly in the face of
534 the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

The holding in *Willing* v. *Binenstock*, 302 U. S. 272, and *Scott* v. *Armstrong*, 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

538 *Opinion.*

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution
539 of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933
540 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Eveloff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed.

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Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

545 Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,

vs.

JOSEPH F. LOEHR, Mayor, etc., *et al.*,
Defendants-Appellants.

No. 231.

546

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

JOSEPH F. LOEHR, Mayor, *et al.*,

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

550

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 183, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

551

WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor, *et al.*,

Defendants-Appellants.

as the same remain of record and on file in my office.

552

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5714)